Supreme Court, U.S.
FILED
05165 JUN 26 2006
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

KMART CORPORATION,

Petitioner,

v.

COUNTY OF STEARNS,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Minn. Stat. § 278.05, subd. 6(a) (2002) requires a taxpayer to provide to the assessor, within 60 days of commencing a property tax petition, undefined "information . . . for income-producing property" or face mandatory dismissal of the petition.

1. Did the Minnesota Supreme Court's holding that the information to be provided has no definition or limitation, but consists of "any and all information," render the statute unconstitutionally vague and deny Petitioner its right to due process of law under the Fourteenth Amendment to the Constitution?

2. Did the Minnesota Supreme Court's holding, that prior Minnesota Tax Court decisions that interpret the statute and provide objective guidance defining the information to be provided have no precedential value, deny Petitioner its right to due process of law under the Fourteenth Amendment to the Constitution?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this Petition are fully identified in the caption. Kmart Corporation is a wholly-owned subsidiary of Kmart Management Corporation, which is a wholly-owned subsidiary of Kmart Holdings Corporation, which in turn is a wholly-owned subsidiary of Sears Holdings Corporation.

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OPINIONS BELOW

The Minnesota Tax Court issued its Order on January 4, 2005 dismissing petitions filed by Kmart Corporation pursuant to Minn. Stat. § 278.01 challenging the valuation of its store location in Stearns County, Minnesota, for property tax purposes. *Kmart Corp. v. County of Stearns*, 2005 WL 94810 (Minn. Tax Ct. 2005). The Tax Court's Order and Memorandum are reprinted in Petitioner's Appendix ("App.") at page 54. Kmart thereafter received permission to move for reconsideration of the Tax Court's Order. Its motion for reconsideration was denied on March 3, 2005. 2005 WL 937620. *See* App. 34.

Kmart timely appealed the two decisions of the Tax Court to the Minnesota Supreme Court, and on February 9, 2006, the Minnesota Supreme Court issued its Opinion affirming the Tax Court's Orders. *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761 (Minn. 2006). *See* App. 3. The Minnesota Supreme Court's Opinion was issued without the benefit of oral argument and was decided, in part, on issues raised by neither party in the briefing. Thereafter, Kmart sought rehearing, which the Minnesota Supreme Court denied on March 27, 2006. *See* App 1.

JURISDICTION

Petitioner seeks review of the decision of the Minnesota Supreme Court, filed on February 9, 2006. Petitioner's request for rehearing was denied by the Minnesota Supreme Court on March 27, 2006. Jurisdiction to review the final judgment of the Minnesota Supreme Court in this case by Writ of Certiorari exists under 28 U.S.C. § 1257(a) and

§ 2101(c), in compliance with Rule 12 of the Rules of the Supreme Court of the United States.

Because the constitutionality of a statute of the State of Minnesota is drawn into question, and the State of Minnesota and its employees are not parties, 28 U.S.C. § 2403(b) may apply, and the Attorney General of the State of Minnesota is being served with this Petition pursuant to Rule 29(4)(c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This Petition involves the application of the Fourteenth Amendment to the United States Constitution, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provision of Minn. Stat. § 278.05, subd. 6(a) (2002) at issue (the so-called "60-Day Rule") provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the

petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

STATEMENT OF THE CASE

Like virtually every state, Minnesota taxes real property based upon its market value, and forbids property from being valued, for taxation purposes, above fair market value or unequally to comparable properties. Minn. Stat. § 278.01. To protect against discriminatory and unfair taxation of real property, Minnesota has created a mechanism by which taxpayers can file a petition to challenge the validity of the assessor's valuation of their property. Minn. Stat. § 278.01. Taxpayers must pay taxes as assessed in order to take advantage of the procedures; otherwise a petition under section 278.01 is dismissed automatically. Minn. Stat. § 278.03, subd. 1.

Petitions to challenge the assessor's valuation of the property or other aspects of the tax may be commenced in state district court in the county where the property is located or in the Minnesota Tax Court. Minn. Stat. § 278.01, subd. 1. If commenced in state district court, the district court has an absolute right to transfer the case to the Tax Court for resolution. *Id.* Virtually all district courts in all counties in Minnesota have standing orders to transfer property tax challenges to the Minnesota Tax Court. Thus, the Tax Court is the forum in which property tax challenges are heard.

The Tax Court was created by the Minnesota legislature as an independent agency of the executive branch. Minn. Stat. § 271.01, subd. 1. It is "a court of record," *id.*, and by statute has "statewide jurisdiction" to be "the sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state ... in any case that has been transferred by the district court to the tax court." Minn. Stat. § 271.01, subd. 5. The Minnesota Supreme Court previously held that the Tax Court, "unlike other administrative agencies, is given uniquely judicial powers," and that as such, its decisions "are accorded the same finality and deference as those of the district court." *In re McCannel*, 301 N.W.2d 910, 919 (Minn. 1980).

In addition to the requirement that the assessed taxes must be paid in order to maintain a petition to challenge the assessor's valuation, Minnesota law also imposes an additional requirement for taxpayers challenging the valuation of "income-producing property."[1] Specifically, Minnesota law requires such taxpayers to provide to the county assessor "information" relating to, among other things, "income and expenses" of the property within 60 days of filing a petition under § 278.01. The failure to comply with this "60-Day Rule" results in dismissal of the petition. The rule provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition

[1] The Minnesota courts have interpreted "income-producing property" to include almost any property that is not owner-occupied, ranging from office buildings and shopping centers to duplex apartments and rented rooms.

> has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a) (2002). (This is the version of the statute applicable to Petitioner's property tax petitions in this case. The statute was subsequently amended in 2003, but the amendment did not add any definitions or interpretive guidance. *See* Minn. Stat. § 278.05, subd. 6(a) (2003).)

In addition to the "information" that the taxpayer must provide within 60 days of filing a petition, the assessor is entitled to full discovery of any and all information during the course of the litigation of the petition as permitted by the Minnesota Rules of Civil Procedure. *See Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990). Thus the 60-Day Rule does not replace or supersede the discovery process.

Minnesota's statutory scheme does not define with specificity any of the terms used in the 60-Day Rule. It does not define what "information" about income-producing property must be provided, aside from enumerating three undefined categories of information that are included. It does not say if the enumerated items ("income and expense figures," etc.) are an all-inclusive list or whether additional, unmentioned information must also be produced. It does not define whose "information" must be produced, for example, income and expense information of a tenant business that leases the property or income and expense information of the property owner/lessor. It does not specify if summary data is sufficient or if voluminous backup and supporting documents

must also be provided. It does not define "income and expense figures" or any other terms in the statute.

The lack of any meaningful definition of the "information . . . for income-producing property" that must be provided under the 60-Day Rule in order to avoid mandatory dismissal poses a significant problem for Minnesota taxpayers. A county and its assessor's office, after the 60-day period has expired, may assert, as Stearns County did here, that certain information should have been provided, but was not -- for example in this case, expenses paid by the tenant in operating its business (as opposed to property-related expenses paid by the owner of the subject property). However, by the time a county identifies particular information that it says the taxpayer should have provided, the 60-day period has expired and it is too late to avoid dismissal. Thus, the taxpayer has to guess at what information the county might later assert is relevant, and the county enjoys the ability to *subjectively* determine, *after the fact*, that additional information should have been provided. The taxpayer will never know precisely what information the county believes is necessary to avoid dismissal until *after* the 60-day period for producing the information has already expired. The statute imposes no time limit for counties to bring 60-Day Rule dismissal motions, and such motions can be, and have been, brought years after the fact.

Although the statute, on its face, provides no meaningful limits on the scope of the "information" that must be produced, the Minnesota Tax Court, which is the "sole, exclusive and final authority for the . . . determination of all questions of law and fact arising under the tax laws of the state," Minn. Stat. § 271.01, subd. 5, through a series of decisions prior to its decision in this case, had ameliorated somewhat the vagueness of the statute by providing some

working definitions of the terms and direction to taxpayers about what information must be provided in order to avoid dismissal. Significant to this case, the Tax Court over several years had issued a series of rulings holding that the term "expenses" in the statute did *not* include expenses paid by a tenant of the subject property. In *Kmart Corp. v. County of Douglas*, 2001 WL 40361 (Minn. Tax Ct. Jan. 11, 2001), the Minnesota Tax Court explained:

> The value of the property, as determined under the income approach, requires capitalizing the value of the income stream from the property after the expenses that reduce the income stream are deducted. Since expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property.

App. 124. Accordingly, the Tax Court held, "because, under normal situations, the tenant business data, *including expenses relating to the real estate that are paid by the tenant*, is not useful in appraising the market value of the property, *it is not required to be provided under the 60 Day Rule*." App. 126 (emphasis added). Requiring production of information about tenant-paid expenses, according to the Tax Court, "would potentially require that volumes of business records be turned over in every case within 60 days for no apparent purpose." *Id.*

Other Tax Court decisions similarly gave the term "expenses" in the 60-Day Rule this same definition, concluding voluminous business records about tenant-paid real estate expenses are not required. *See Kmart Corp. v. County of Otter Tail*, 2000 WL 1719925 (Minn. Tax Ct. Nov. 16, 2000) ("We reject the County's argument that Petitioner must

provide income and expense information of operating the store under the 60-Day Rule. Income and expenses of operating the store is not relevant to value the property") (App. 135); *FACS of New Ulm LLC v. County of Brown*, 2001 WL 40352 (Minn. Tax Ct. Jan. 11, 2001) ("we have held that income and expense information pertaining to the underlying business operation is ot normally subject to the requirements of the 60 Day Rule") (App 80); *Kmart Corp. v. County of St. Louis*, 2001 WL 40370 (Minn. Tax Ct. Jan. 11, 2001) ("Since other *operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant* do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. Therefore, these other operating expenses *do not need to be provided* [under the 60-day rule] in this case") (emphasis added, citation omitted) (App. 142); *Kmart Corp. (Anoka) v. County of Anoka*, 2004 WL 612777 (Minn. Tax Ct. March 4, 2004) ("tenant business data, including expenses relating to the real estate that are paid by the tenant . . . is not required to be provided under the 60-Day Rule"). (App. 102). This guidance from the Tax Court on tenant-paid expenses was consistent with its rulings concerning the non-relevance of tenant income to the value of the property. *See Minnesota Timberwolves Limited Partnership v. County of Hennepin*, 1999 WL 236600 (Minn. Tax Ct. Apr. 20, 1999) ("What someone pays to attend a rock concert is not relevant to what the Target Center is worth. We agree . . . that information relevant to determine the market value of the Target Center includes income derived from the property, not income businesses within that property derived") (App. 164).

In the present case, Petitioner Kmart commenced petitions in 1999, 2000, and 2001 to challenge the excessive and unequal valuation of property in Stearns County, Minnesota, where it leases space to operate a general merchandise store.[2] In each case, Kmart provided information to the County Assessor within the 60-day period, including lease information showing rent paid, drawings showing the net rentable areas and other information. Kmart provided net profit reports "for the *retail store* operation," and noted that because it is a tenant, not the owner, it does not possess "operating budgets for the *real estate*." Brief of Relator Kmart Corp. at 6.

After the 60-Day Rule expired for the petitions in each tax year, Stearns County moved to dismiss Kmart's petitions due to the alleged failure to provide information about expenses paid by Kmart in connection with the operation of its business at the property.

The Tax Court, contrary to its prior decisions holding that tenant-paid expenses are *not* relevant to the value of the property and do not need to be provided under the 60-Day Rule, reversed course in this case and dismissed Kmart's petitions for failure to provide sufficient "information," specifically, the tenant-paid expenses: "We hold that tenant-paid real estate expenses are required to be produced under the 60 Day Rule." App. 61.

Kmart thereafter sought reconsideration of the decision, arguing that the decision was contrary to prior Tax Court decisions, and that the prior tax court decisions should be

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[2] Under its lease with the owner of the property, Kmart is responsible for paying the real estate taxes, and thus, as the Minnesota Tax Court and Supreme Court concluded, has standing to challenge the assessed value.

followed, for reasons of *stare decisis*[3] and to permit some clarity about what the vague terms in the 60-Day Rule mean to taxpayers trying to comply. In the alternative, Kmart asked the Tax Court not to apply its new ruling retroactively.

On rehearing, rather than provide guidance on the scope of the information required under the 60-Day Rule, the Tax Court expressly refused to put any limits on the scope of "information" that would be required, instead holding:

> The 60 Day Rule requires the production of any and all information available relating to the subject property. To create a bright-line itemization rule would be to obliterate the broad production requirements. To contemplate a valuation process implicated by the 60 Day Rule and thus the information relevant to be produced would also be to narrow the broad production requirements.

App. 45.

Kmart thereafter sought review of the Tax Court's decision in the Minnesota Supreme Court. In its brief on appeal, Kmart argued, among other things, that the Tax Court's decision -- under which no guidance is provided to taxpayers to know what information is required to be produced under the 60-Day Rule, and which lets counties subjectively determine, after the fact, that additional material should have been

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[3] The Tax Court has consistently held that it is bound, under principles of *stare decisis*, to follow its own precedents. *Engdahl v. Comm'r of Revenue*, 1996 WL 85850 (Minn. Tax Ct. Feb. 26, 1996) ("we are bound by our prior decision. *Stare decisis* dictates this result"). (App. 124.)

produced -- renders the statute impermissibly vague and violates due process. *See* Brief of Relator Kmart Corporation, at p. 34. Kmart also argued that the Tax Court, by rejecting its own prior precedent concerning the scope of the 60-Day Rule, created a new rule of law that should have no retroactive application pursuant to the requirements of the Due Process Clause.

On February 9, 2006, the Minnesota Supreme Court issued its Opinion affirming the Tax Court, specifically endorsing the holding that the 60-Day Rule presents an ad-hoc determination in each case, and that whether a taxpayer has provided sufficient "information" must be decided on a case-by-case basis. The Court did not address Kmart's due process arguments. Regarding Kmart's argument that the Tax Court's decision amounted to a change in existing law and therefore should not be applied retroactively, the Court held that the series of prior Tax Court decisions holding that tenant-paid business expenses did not need to be provided under the 60-Day Rule were non-precedential, and could not be relied upon by litigants. 710 N.W.2d at 769. Therefore, the Court held that the decision of the Tax Court newly requiring production of tenant-paid expenses could be applied retroactively to dismiss petitions filed in reliance on the prior Tax Court holdings that tenant-paid expenses were not required.

Thereafter, Kmart timely submitted a Petition for Rehearing to the Minnesota Supreme Court, arguing that it had failed to consider or resolve Kmart's claim that the "shifting and undefined scope of the 60-Day Rule constitutes a denial of due process under the state and federal constitutions." *See* Petition for Rehearing at p. 9. Kmart also pointed out that neither party to the appeal had advocated a rule that Tax Court opinions are non-precedential, and the Court should

entertain briefing on that issue before radically changing the structure of Tax Court jurisprudence in Minnesota. *Id.*, pp. 12-13. Because the Minnesota Supreme Court had not entertained oral argument in connection with Kmart's appeal, Kmart also asked for oral argument and re-briefing of all issues newly raised by the Court's decision. On March 27, 2006, the Minnesota Supreme Court denied the Petition for Rehearing without comment.

ARGUMENT

REVIEW IS WARRANTED BECAUSE THE MINNESOTA COURTS HAVE DECIDED IMPORTANT DUE PROCESS QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

I. Permitting a Taxpayer's Right to Petition for Relief From Invalid Taxation to Be Extinguished by a Vague Rule that Permits the Taxing Authority to Subjectively Determine, After the Fact, that the Taxpayer Failed to Produce Undefined "Information" Offends this Court's Due Process Jurisprudence.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

> Vague laws offend several important values. . . . Vague laws may trap the innocent by not providing fair warning. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

See Kolender v. Lawson, 461 U.S. 352, 358 (1983) (the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement") (citation omitted).

Prior to the decisions of the Tax Court and the Minnesota Supreme Court in this case, the Tax Court's interpretation of the 60-Day Rule did not raise constitutional vagueness issues. Despite the statute's facial ambiguity and lack of definition about the scope of "information . . . for income-producing property" that must be provided, the Tax Court interpreted the statute in a manner that provided a defined, consistent and objective standard for compliance. The Tax Court did not view the statute as requiring "any and all" information that any assessor might one day -- after the expiration of the 60-day period -- claim to be related to an income-producing property. Instead, the Tax Court interpreted the statute to require sufficient information "to allow an expert to begin (if not complete) reaching a decision regarding value. Additional material may be useful and discoverable but it is not mandated within the 60-Day Rule." *LG&E Power Services, Inc. v. County of Lincoln*, 1999 WL 339260 (Minn. Tax Ct. May 18, 1999). In *LG&E*, for example, the Tax Court recognized that "any and all" information potentially relevant to the property's value realistically could not be

provided, and rejected a county assessor's argument that failure to provide backup data to information provided in summary and additional accounting information during the 60-day period was not a basis for dismissal:

> To make such a ruling would impose a huge and unworkable burden on the taxpayer. Such a ruling would also put taxpayers at risk of dismissal while never knowing "how much is enough."

App. 150. By limiting and defining the otherwise limitless language of the statute, the Minnesota Tax Court previously created workable standards that taxpayers could understand and follow. For example, the Tax Court held on multiple occasions (as discussed above at pp. 6-8) that the 60-Day Rule did not require a tenant to produce information about tenant-paid expenses, even where its expenses included items related to the real estate such as insurance, utilities, repairs and maintenance.

Following the Minnesota Supreme Court's decision in this case, no objective standard exists any longer to inform taxpayers what "information" must be provided during the 60-day period to avoid dismissal of a tax petition. Both the Tax Court and the Minnesota Supreme Court have declared that henceforth, no "bright-line rules" can be announced to determine what information needs to be provided. App. 41. Instead, the 60-Day Rule requires an after-the-fact, ad hoc determination in each case whether the taxpayer provided "all information relating to the property."

The decisions of the Minnesota Tax Court and Supreme Court set an impermissible subjective standard for compliance. The scope of what must be provided is, simply,

everything any county might one day -- after the 60-day period has expired -- claim to be related to an income-producing property. Relevance is determined by the subjective, after-the-fact determinations of the county. Taxpayers have no advance way of knowing what information a creative county assessor or attorney may claim in the future was necessary.[4] The Tax Court agreed that this is an analysis that takes place after it is too late for the taxpayer to do anything about complying with the statute, emphasizing that "[w]hether or not the information is necessary for the purposes of valuation is determined after the 60-day period." App. 52.

Permitting the taxing authority to have the discretion, after the fact, to declare what information the taxpayer should have provided, at a time when it is too late for the taxpayer to do so, violates the taxpayer's due process rights. A statute which permits substantive and procedural rights to be terminated based on undefined criteria, which the taxpayer's litigation adversary may redefine subjectively after the fact, is void for vagueness.

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[4] For example, the potentially unlimited "backup data" and accounting information that the Tax Court in *LG&E Power* said would impose a "huge and unworkable burden" on taxpayers and put them at risk of "never knowing how much is enough" could now be claimed by a county attorney as information not provided under the 60-Day Rule justifying dismissal.

II. The "Bait and Switch" of Holding Out a Remedy to Challenge Illegal Taxation, and Then Thwarting the Remedy by Changing the Rules Mid-Course, Violated Petitioner's Due Process Rights.

Taxpayers have a due process right to a "clear and certain" remedy for unlawfully collected taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18 (1990). "Because exaction of a tax constitutes a deprivation of property, the state must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 U.S. at 36. The procedural safeguards can include pre-deprivation process, such as suits to enjoin the imposition of the tax prior to payment, or post-deprivation safeguards under which the state can require payment of the taxes before permitting a challenge by the taxpayer. *Id.* at 37; *Reich v. Collins*, 513 U.S. 106, 108 (1994).

In order for a post-deprivation refund action to satisfy the Due Process Clause "the state must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson*, 496 U.S. at 39.

While a state may permissibly, as Minnesota has done here, afford a post-deprivation remedy in which the taxpayer is required to pay taxes and subsequently challenge the validity of the tax, a state may not engage in a "bait and switch" by effectively negating the post-deprivation remedy after the taxpayer has followed what it understood to be the procedural rules. *Reich*, 513 U.S. at 111. *Newsweek, Inc. v. Florida*

Dept. of Revenue, 522 U.S. 442 (1998); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Reich*, the taxpayer paid the disputed taxes and brought a claim for refund under the post-deprivation remedies provided by Georgia law. Thereafter, the Georgia Supreme Court ruled that the refund procedure would not apply to the type of tax at issue in the case, and that therefore, because Reich had paid the taxes, he could no longer pursue pre-deprivation remedies provided by Georgia law. This Court reversed, holding that while a state has the flexibility to fashion pre-deprivation or post-deprivation remedies, "what a state may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to 'bait and switch.'" 513 U.S. at 111.

In this case, Minnesota has unfairly engaged in a "bait and switch" to negate the remedy to challenge unlawful property taxes paid by the taxpayer, much in the same way as Georgia improperly restricted the taxpayer's post-deprivation remedy.

Minnesota established a procedure for challenging invalid taxes by filing a petition to adjust the valuation of the property and obtain a refund of taxes that were improperly levied. Minnesota law establishes a procedural obstacle for using the petition procedure, the 60-Day Rule. Through a series of Tax Court decisions, it had created a safe harbor for litigants to avoid dismissal of their petitions by specifically and objectively defining what type of information must be produced under the 60-Day Rule.

In this case, Kmart relied upon these decisions of the Tax Court in determining what information to provide the county assessor within 60 days of filing its petitions in order to avoid automatic dismissal. After Kmart's time for compliance had come and gone, the Minnesota Tax Court and Supreme Court changed the rules of the game, dismissing Kmart's petitions

for failure to produce the very information that prior Tax Court decisions stated need not be produced. Holding out a remedy to challenge improper taxation, and then taking it away after the taxpayer attempts to use the remedy, is precisely the type of due process violation that occurred in *Reich*, *Newsweek* and the present case.

III. Petitioner Has a Due Process Right to Rely on the Minnesota Courts to Recognize and Apply the Doctrine of Precedent.

In determining, under the procedural component of the Due Process Clause, what reasonable process is due to a litigant facing a deprivation of life, liberty or property, traditional common law practice is "the touchstone for constitutional analysis." *Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). "Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial." *Honda*, 512 U.S. at 430. However, in the "handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure . . . this Court has not hesitated to find the proceedings violative of due process." *Id.* "The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the due process clause." *Id.* at 436 (Scalia, J., concurring).

In *Honda*, the Court held that Oregon's abrogation of the well-established common law right of judicial review of the amount of punitive damage awards violated the due process clause. Tracing the history of the common law procedure for review of punitive damages awards, the Court concluded that "judicial review of the size of punitive damage awards has

been a safeguard against excessive verdicts for as long as punitive damages have been awarded." 512 U.S. at 421. "Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against [the] danger [of excessive verdicts]." Oregon's abrogation of that procedure, "without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time . . . violates the due process clause of the Fourteenth Amendment." *Id.* at 432.

Perhaps no common law procedure is more entrenched than the rule of *stare decisis* or precedent. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78 (1803). "Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (citations omitted).

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial system." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Courts have a common law obligation to follow prior precedents unless the case at bar can be distinguished, overruled, or modified. *Id.*

"The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia," and "to the jurists of the late Eighteenth Century (and thus by and large to the

Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law." *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) *vacated as moot on rehearing en banc* 235 F.3d 1054 (8th Cir. 2000) (citations omitted). Judge Arnold's recitation of the history of the doctrine of *stare decisis* in the *Anastasoff* case traces the doctrine of precedent back through English history and suggests that the doctrine of precedent was brought to England by the Romans. *Id.* at 900.

The significance of the doctrine of *stare decisis* and precedent to the judicial process cannot be overstated. Justice and Professor Joseph Story in *Commentaries on the Constitution of the United States* §§ 377-78 (1883) puts it this way:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

In this case, the Minnesota Supreme Court adopted just such an "alarming doctrine," holding that the Minnesota Tax Court is at liberty to disregard any and all of its former rulings and decide cases for itself on an ad hoc basis with no regard to settled rules and principles. The Minnesota Supreme Court held that decisions by the Minnesota Tax Court -- which was established by the legislature as "the sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising out of the tax laws of this state" (Minn. Stat. § 271.01 subd. 5) – "have little, if any, precedential effect." 710 N.W.2d at 769. The issue of the precedential

effect of Tax Court decisions arose in a context of the Court's consideration of whether the Tax Court decision at issue should not be given retroactive effect. The Court concluded that the decisions of the Tax Court do not qualify as precedent for purposes of retroactivity analysis. *Id.*

The Minnesota Supreme Court's abrogation of the doctrine of *stare decisis* for decisions of the Tax Court, and its statement that henceforward Tax Court decisions will not be given precedential effect within the Tax Court, are violations of due process. The doctrine of precedent provides important procedural safeguards for litigants, and permits parties to rely upon judicial decisions in determining how to conduct their affairs. *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). The idea that Tax Court judges are free of the restraint of prior precedent, and can decide each issue as they see fit, without any obligation to explain their rationale for differing from other cases in which the same issues have been resolved, is repugnant to the notions of procedural fairness inherent in the due process clause.

Given its legislatively assigned task of being a "court of record" whose "judges" are to decide "all questions of law and fact arising under the tax laws of the state, and to serve as the "sole, exclusive, and final authority," on such issues, and to provide uniform and consistent interpretations of the tax laws of the State of Minnesota, the Tax Court's decisions must have precedential effect. To announce that the Tax Court's "uniquely judicial" function, *McCannel*, 301 N.W.2d at 919, may now be performed without adherence to its own precedents, one of the time-honored hallmarks of our nation's judicial system abrogates important common law procedural protections and violates due process.

♦

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari.

June 26, 2006

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

A05-442

Kmart Corporation,

Relator,

vs.

County of Stearns,

Respondent.

ORDER

Based upon the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

1. The petition for rehearing of Kmart Corporation is denied.

2. The request of Greater Minneapolis Building Owners and Manufacturers Association, et al. for leave to file a brief as amici curiae is denied.

3. The Clerk of Appellate Courts shall tax costs of $300 under Minn. R. Civ. App. P. 139.01(1) and disbursements in the amount of $131.85 under Minn. R. Civ. App. P. 139.02 in favor of respondent County of Stearns.

Dated: March 27, 2006

BY THE COURT:

/s/ Sam Hanson

Sam Hanson
Associate Justice

GILDEA, J., having not been a member of this court at the time of the argument and submission, took no part in the consideration or decision of these matters.

STATE OF MINNESOTA

IN SUPREME COURT

A05-442

Minnesota Tax Court

Hanson, J.
Concurring in part, dissenting in part,
Anderson, Paul H., J.
Took no part, Gildea, J.

Kmart Corporation,

Relator,

Filed: February 9, 2006
Office of Appellate Courts

vs.

County of Stearns,

Respondent.

SYLLABUS

1. Under "the 60-day rule" contained in Minn. Stat. § 278.05, subd. 6(a) (2002), a tenant is required to provide to the county sufficient information on tenant-paid real estate expenses within 60 days of filing a petition for review of the property tax assessment.

2. Prior decisions of the tax court incorrectly interpreting the 60-day rule did not create such binding

precedent as to require that the present decision of the tax court correctly interpreting the rule be given purely prospective application.

Affirmed.

Considered and decided by the court en banc without oral argument.

OPINION

HANSON, Justice.

This property tax appeal raises two issues. The first is whether Minn. Stat. § 278.05, subd. 6(a) (2002),[1] known as the "60-day rule," requires a taxpayer to provide the county with information on tenant-paid real estate expenses (specifically property taxes, utilities, insurance, and maintenance and repair expenses) within 60 days of filing a chapter 278 petition. The tax court interpreted the statute to require production of this information, despite prior tax court decisions arguably to the contrary. The second issue is whether a taxpayer should be relieved of the sanction of dismissal of a chapter 278 petition because it relied on the tax court's prior erroneous interpretations of the 60-day rule. We affirm the tax court and deny relator's request for purely prospective application of our holding.

Relator Kmart Corporation leases retail property in Stearns County, Minnesota. Under the terms of the lease, Kmart is responsible for paying the property taxes.[2] In 2000, 2001, and 2002, Kmart filed timely petitions under chapter 278 of Minnesota Statutes challenging the Stearns County assessor's valuations of the property.

Chapter 278 provides "an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the * * * court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed." *Cont'l Sales and Equip. Co. v. Town of Stuntz*, 257 N.W.2d 546, 548 (Minn. 1977) (quoting *Land O' Lakes Dairy Co. v. Village of Sebeka*, 225 Minn. 540, 548, 31 N.W.2d 660, 665 (1948)). Adjudication of a chapter 278 petition involves different

procedures than those normally applicable under the rules of civil procedure. Minn. R. Civ. P. 81.01; Minn. R. Civ. P. app. A. One of these procedural differences is a disclosure requirement commonly known as the "60-day rule." Minn. Stat. § 278.05, subd. 6(a). It provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Id. The subject of this appeal is the requirement that the petitioner produce "expense figures" and "anticipated * * * expenses."

Within 60 days of filing each petition, Kmart provided Stearns County with a site drawing of the leased property and a copy of its lease. The lease indicates that Kmart is responsible for paying certain expenses including property taxes; insurance on common areas; costs of repairs, maintenance, and improvements; and all utilities (gas, water,

sewage, telephone, electricity, etc.). Kmart did not provide Stearns County with statements that detailed or separated the amounts it paid for each of these expenses.[3]

Stearns County moved to dismiss all three petitions for failure to comply with the 60-day rule. Stearns County argued that the 60-day rule requires Kmart to produce information concerning the real estate expenses that Kmart was responsible for under the terms of the lease. Kmart argued that only owner-paid, and not tenant-paid expenses are required to be produced under the 60-day rule. Kmart also argued that the petitions should not be dismissed because Kmart's failure to provide tenant-paid expenses "was due to the unavailability of the information," within the meaning of the 60-day rule. Kmart submitted an affidavit stating that Kmart does not maintain any records that "separately identify the operating expenses for the real estate of the subject property."

The tax court held that "[t]he plain language of the statute and the Minnesota Supreme Court's holding in *BFW* requires real estate expense information to be produced." *Kmart Corp. v. County of Stearns*, Nos. CX-00-404, CX-01-1465, C2-02-1387, 2005 WL 94810 at *3 (Minn. T.C. Jan. 4, 2005) (herein "*Stearns County I*") (referencing *BFW Co. v. County of Ramsey*, 566 N.W.2d 702 (Minn. 1997)). The court acknowledged that Kmart is not required to produce expense figures for operating the business on the subject property but determined that Kmart is required to produce expense figures for operation of the real estate. *Id.* at *2. Further, the court held that Kmart's "unavailability" defense was not credible because the lease required Kmart to pay these expenses. *Id.* at *4.

Kmart moved for reconsideration and also argued that if its motion was denied, *Stearns County I* creates a new principle of law that should only be applied prospectively. The tax court denied the motion and further determined that its decision did not create a new principle of law that would warrant prospective application. *Kmart Corp. v. County of Stearns*, Nos. CX-00-404, CX-01-1465, C2-02-1387, 2005 WL 937620 at *1, 2 (Minn. T.C. March 3, 2005) (herein "*Stearns County II*"). On Kmart's petition, we issued a writ of certiorari to review the tax court orders.

We review a tax court decision "on the ground that the Tax Court was without jurisdiction, that the order of the Tax Court was not justified by the evidence or was not in conformity with law, or that the Tax Court committed any other error of law." Minn. Stat. § 271.10, subd. 1 (2004). Where the facts are undisputed, as they are here, we review conclusions of law, including the interpretation of statutes, de novo. *BFW Co. v. County of Ramsey*, 566 N.W.2d 702, 704 (Minn. 1997).

I.

We begin by considering the correct interpretation of the 60-day rule provided in section 278.05, subdivision 6(a). Kmart asks us to interpret the 60-day rule to distinguish between who pays the real estate expenses for rental property. Without arguing that tenant-paid real estate expenses are not relevant to the appraisal of the real estate, Kmart says the "well-settled" rule is that "the expenses called for by the 60-day Rule are the *owner's* expenses of operating the underlying real estate, and not those of a retail *tenant* whose business is operated at the subject property." (Emphasis added.) Kmart interprets the 60-day rule to only

require from a tenant disclosure of income produced by the property in the form of rent.

We recognize that the tax court has stated, in a series of cases, that the 60-day rule does not require a tenant to produce information on tenant-paid real estate expenses. *See Kmart Corp. (Anoka) v. County of Anoka*, Nos. CX-01-2784, C5-02-2881, C8-03-4232, 2004 WL 612777 at *2 (Minn. T.C. March 4, 2004); *Kmart Corp. (Blaine) v. County of Anoka,* Nos. C1-00-2775, C1-01-2785, C2-02-2885, C1-03-4234, 2004 WL 612789 at *3 (Minn. T.C. March 4, 2004); *Kmart Corp. (Columbia Heights) v. County of Anoka*, No. C3-01-2786, slip op. at 6 (Minn. T.C. March 4, 2004); *Kmart Corp v. County of Douglas*, No. C7-00-309, 2001 WL 40361 at *2 (Minn. T.C. Jan. 11, 2001) (herein "*Douglas County*"); *Kmart Corp. v. County of St. Louis*, Nos. C1-00-600670, CX-00-600666, C3-00-600671, C8-00-600665, 2001 WL 40370 at *3 (Minn. T.C. Jan. 11, 2001) (herein "*St. Louis County*"). But this court is not bound by decisions of the tax court, especially in the area of statutory interpretation. *In re Estate of Abbott*, 213 Minn. 289, 296, 6 N.W.2d 466, 469 (1942).

The statute refers to "expense" without qualification. It does not limit the information to owner-paid expenses. In fact, the question of which party is responsible for these expenses under the lease is irrelevant to the purpose of the 60-day rule to facilitate a speedy, efficient remedy for the taxpayer. In other words, if the real estate related expenses for taxes, insurances, utilities, maintenance, and repair are required to be produced under the 60-day rule when paid by the owner, there is no logical reason why they are not similarly required to be produced when paid by the tenant. The 60-day rule focuses on the "expenses," not on which party has paid them.

Although our past decisions interpreting the 60-day rule deal only with the "income" component, they uniformly support a broad reading of the rule. Thus, in *BFW*, we held that:

> [T]he statute's text requires the petitioner to provide all information within its possession, even though the petitioner deems certain portions of that information to be incomplete or not fully accurate. In addition, we conclude that the statute clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline. The unavailability of one type of evidence does not render unavailable other types of information within the possession of the petitioner.

BFW, 566 N.W.2d at 705.

Also, in *Kmart Corp. v. County of Becker*, we declined to limit the scope of the information required under the 60-day rule. 639 N.W.2d 856 (Minn. 2002). Kmart's lease in *Becker* involved a percent rent clause that increased its rent in the event that its income exceeded a specified amount. *Id.* at 858. We held that this contingency clause triggered a duty for Kmart to disclose its business income, even though this ultimately became irrelevant to the amount of rent paid because its income did not actually exceed the threshold amount. *Id.* at 860. After reviewing the purpose of the rule and its legislative history, we reaffirmed our policy of strictly enforcing the rule and leaving "the overall balancing of competing tax policy considerations to the legislative branch of government." *Id.* at 861. We adopted a broad standard of relevancy, stating: "[w]ithout this

information, the assessor could not begin the valuation process." *Id.* This standard is consistent with the legislature's charge to "every assessor and board, in estimating and determining the value of lands for the purpose of taxation, to consider and give due weight to *every* element and factor affecting the market value thereof." Minn. Stat. § 273.12 (2004) (emphasis added).

Consistent with our past decisions, we interpret the 60-day rule to require production of expense information that is useful and relevant to the appraisal process. Because the undisputed facts of this case and the generally recognized principles of real estate appraisal make it clear that tenant-paid real estate expenses are useful and relevant to the appraisal process, we interpret the 60-day rule to require that they be produced within 60 days of the filing of a chapter 278 petition.[4]

The focus of a property tax appraisal is to determine the fair market value of the property to the owner (the landlord). *See* Minn. Stat. § 278.01, subd. 1 (2004). There are three recognized methods for conducting such an appraisal. *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 302 (Minn. 1990). The comparable sales method, or "market approach," uses sales data for comparable properties. *Id.* at 303. The cost approach seeks to determine the cost of "reproducing a substitute property with the same utility as the subject" property. *Id.* at 302-03. The income model derives the property value by capitalizing the net income that can be earned by the property. *Id.* at 303.

Lease expense information may not be relevant to the cost or comparable sales methods, but it is relevant to the income model. The affidavit of Dwight Dahlen, Stearns County's appraisal expert, explains why this is so. Dahlen

states that the goal of the income model is to estimate the "potential gross rent, the rent that would be collected if the property were fully occupied at market rent." To determine market rent, the appraiser first examines the rents for comparable properties. In order to make that comparison valid, the appraiser adjusts for variations in the manner that the underlying leases allocate the operating expenses between the owner and the tenant by including all operating expenses by whomever paid. This enables the appraiser to compare "expenses reported for the subject property to expense information for comparable properties." Through this comparison, the appraiser attempts to determine how closely the contract rent for the subject property reflects the market rent as determined from the comparable properties. According to Dahlen, the contract rent for a building with very high operating expenses allocated to the tenant may be viewed differently than the contract rent for a building with very low operating expenses or where the expenses are allocated to the landlord.

Kmart did not dispute Dahlen's explanation of the relevance of operating expenses to the use of the income model. That explanation is also consistent with the literature on the subject. Dahlen referred to the publication of the International Association of Assessing Officers, *Property Appraisal and Assessment Administration* (Joseph K. Eckert ed., 1990) (herein "IAAO"). That publication states that because the goal of the appraiser is to determine the potential gross income from the lease, it is important for the appraiser to evaluate leases of comparable properties. *Id.* at 253. The IAAO recognizes that rent may have been set lower than prevailing market conditions due to the various allocations of operating expenses for the real estate between the landlord and tenant. *Id.*[5]

In summary, tenant-paid real estate expenses are relevant to the process of appraising the value of rental property and the 60-day rule requires that they be provided to the county within 60 days of filing a chapter 278 petition. Because Kmart did not disclose any tenant-paid real estate expenses, the tax court correctly determined that Kmart violated the 60-day rule.[6]

II.

We next turn to Kmart's argument that if we affirm the tax court's interpretation of the 60-day rule, we should only apply our holding prospectively because it would constitute a new principle of law and defeat strong reliance interests. We note at the outset that this argument can only apply to Kmart's 2001 and 2002 petitions because the tax court decisions stating that tenant-paid real estate expenses need not be provided under the 60-day rule were filed after the expiration of the 60-day disclosure deadline for its 2000 petition.

Kmart has not referred us to any recognized theory of law that would support its request that the tax court decision in this case (or our decision affirming it) should only be applied prospectively. Kmart relies on the purely prospective ruling doctrine that has, in limited circumstances, been applied to decisions of this court. We conclude that doctrine is not applicable to decisions of the tax court. Further, because Kmart's arguments are founded on a claim of reliance, we have also analyzed them under principles of equitable estoppel. We find those principles equally unavailing.

A. Purely Prospective Ruling Doctrine

As a general rule this court's decisions are given retroactive effect. *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002).[7] But this court has recognized "limited exceptions to the general rule" where "special circumstances" exist. *Id.* at 110-11. This purely prospective ruling doctrine requires that three factors be present:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Hoff v. Kempton, 317 N.W.2d 361, 363 (Minn. 1982) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)). We have emphasized that this doctrine has been applied in "only very limited situations." *Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105, 108 (Minn. 1991).

Kmart bases its request for a purely prospective ruling on a series of tax court decisions that said tenant-paid real estate expenses are not required to be produced under the 60-day rule. The first decision on this point was a 2001 order on a motion for reconsideration in another Kmart case. *Douglas County*, 2001 WL 40361. The tax court said:

> The value of the property, as determined under the income approach, requires capitalizing the value of the income stream from the property after the expenses that reduce the income stream are deducted. Since expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property.

Id. at *2. Although the court concluded that Kmart's failure to provide "tenant paid business expenses related to real estate" did not provide a basis to dismiss the petition, it dismissed the petition on other grounds. *Id.* at *3, 5. Thus the language concerning tenant-paid real estate expenses was not dispositive.

In another order published on the same day, the tax court denied St. Louis County's motion to dismiss one of Kmart's four petitions. *St. Louis County*, 2001 WL 40370 at *3. The court held that Kmart's failure to produce tenant-paid real estate expenses did not require dismissal under the 60-day rule.[8] *Id.* But the court provided no reasoning for this conclusion other than a citation to *Douglas County*. *Id.* The other eight decisions that Kmart cites were either decided after the expiration of the 60-day deadline following Kmart's filing of its 2002 petition,[9] or do not support the interpretation of the 60-day rule that Kmart proposes.[10]

Even if the conclusions stated in *Douglas County* and *St. Louis County* could be characterized as being "clearly established," we conclude that they do not qualify as the type of "precedent" on which litigants may rely for retroactivity purposes. Although the tax court is described as a "court," it is an administrative agency within the executive branch. *See Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 222-25 (Minn. 1979) (distinguishing the tax court from judicial courts and upholding the constitutionality of the tax court statute, as against claimed violation of separation of powers, on the grounds that the taxpayer has the opportunity to elect to proceed in district court and because the tax court decisions are subject to judicial review of right in this court). As such, its decisions have little, if any, precedential effect. *See Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656, 661 (Minn. 2004) (characterizing decisions of the tax court as being "nonbinding when in conflict with decisions of this court"); *In re Whitehead*, 399 N.W.2d 226, 229 (Minn. App. 1987) (recognizing that if a tax court's departure from a "previous practice" is sufficiently supported by "reason or explanation," "an administrative agency is not bound to rigid adherence to precedent").[11]

The dissent relies on the two court of appeals decisions to support the proposition that there are some limits on the ability of an agency to depart from precedent, but those cases only require that there be a reasonable basis for any departure. The conclusion that precedent was based on an erroneous interpretation of a statute surely provides a reasonable basis to depart. Here, it is unclear whether the tax court is departing from *Douglas County* and *St. Louis County* because, as noted, the interpretation of the 60-day rule in those cases was not clear. But, to the extent the tax court did depart, it did so by correctly interpreting the 60-day rule,

which provided a reasonable basis for departure and prevented its decision from being arbitrary or capricious.

We conclude that the decisions of the tax court do not qualify as precedent for purposes of retroactivity analysis. This conclusion is reinforced by the fact that the tax court serves as an alternative venue to the district court for chapter 278 petitions.[12] Decisions of district courts likewise are not regarded as precedent for retroactivity purposes. *See In re Appeal of the Crow Wing County Att'y*, 552 N.W.2d 278, 280 n.2 (Minn. App. 1996). Because the tax court serves the same function as district courts in adjudicating property tax appeals, its decisions should not have greater precedential effect than decisions of the district court.

Moreover, even if the doctrine of stare decisis were to apply to some orders of the tax court, it would not apply to orders "which are in conflict with the express provisions of statutory law." *Murphy Motor Freight Lines, Inc. v. Witte Transp. Co.*, 260 Minn. 440, 453, 110 N.W.2d 296, 305 (1961) (citing 2 Kenneth Culp Davis, *Administrative Law Treatise* § 17.07 (1st ed. 1958)). As in *Sprint*, where we held that a tax court case is nonbinding if it directly contradicts a previous holding of this court, *see Sprint*, 676 N.W.2d at 661, a tax court case (like *Douglas County* and *St. Louis County*) is nonbinding if it directly contradicts a statute. Thus, where the tax court incorrectly interprets a statute in one case, that interpretation does not override the statute in future cases. And, of course, decisions of the tax court have no binding effect on this court when we are ultimately called on to interpret a statute. *Care Inst., Inc.-Maplewood v. County of Ramsey*, 576 N.W.2d 734, 738 n.4 (Minn. 1998).

The dissent expands on Kmart's arguments by referring to the test for retroactivity of administrative agency

decisions followed by a line of federal cases. These cases were not discussed by the parties, likely because they have no application to an administrative agency's interpretation of the plain meaning of a statute.

The dissent fails to distinguish between different types of administrative actions. Some administrative actions involve the agency's quasi-legislative power to make policy, including rules or regulations, within the framework of an enabling statute. *See* Minn. Stat. § 14.05 (2004); *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977) (stating when an agency acts in a legislative capacity, "its decisions will be upheld [on judicial review] unless shown to be in excess of statutory authority or resulting in unjust, unreasonable, or discriminatory [decisions] by clear and convincing evidence."). Other administrative actions involve the agency's quasi-judicial powers to adjudicate cases. Minn. Stat. § 14.58 (2004); *St. Paul Area Chamber of Commerce*, 312 Minn. at 259-61, 251 N.W.2d at 356, 358 (stating when an agency acts in a judicial capacity, its decision will be reviewed under the substantial-evidence standard).

The cases cited by the dissent in support of a prospective test do not involve a change in an agency's interpretation of a statute when made in its quasi-judicial capacity, but a change in the agency's interpretation or application of its own policies, rules or regulations, made in a quasi-legislative capacity. *E.g., Williams Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 3 F.3d 1544, 1546, 1552 (D.C. Cir. 1993) (addressing precedent permitting utilities to recover increases in natural gas costs under an automatic purchase gas adjustment policy devised by the agency); *Chang v. United States*, 327 F.3d 912, 915-16 (9th Cir. 2003) (involving the retroactive application of amendments to rules

promulgated by the agency); *Farmers Tel. Co. v. Fed. Comm'n*, 184 F.3d 1241, 1243 (10th Cir. 1999) (reviewing agency's interpretation of its own regulations); *Laborers Int'l Union of North America, AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 385-86 (3d Cir. 1994) (approving the retroactive application of an agency decision that reversed agency practices that were not dictated by statute). Obviously, agency decisions based on its own policies, rules and regulations should have greater precedential effect, but even here an agency is not arbitrary or capricious when it reverses a past policy on a reasonable basis.

The only federal decision that appears to discuss this prospectivity test in the context of an agency's interpretation of a statute is *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044 (5th Cir. 1998). The court began with two analyses to determine its scope of review:

> If the language of the statute plainly resolves the point, we of course must enforce it. * * * But if the statute is ambiguous, we must defer to "reasonable interpretations" made by the agency charged with administering it.

139 F.3d at 1047. The court then determined that although some parts of the agency decision were required by the plain language of the statute, other parts were left open by the statute and were within the policymaking authority of the agency. *Id.* at 1049. The court only addressed the issue of retroactivity in connection with the latter parts of the agency decision that involved agency policymaking. *Id.* at 1049-50.

As applied here, there is no claim that the legislature's enactment of the 60-day rule left open any question of policy for the tax court to decide. In fact, the tax court is not even

charged with the exclusive administration of the 60-day rule. As noted, the tax court is only one adjudicative body that may hear claims under chapter 278, as an alternative to the district court.

Because we hold that the plain words of the 60-day rule require production of tenant-paid real estate expenses, we conclude that the federal prospectivity test does not apply to any changes the tax court may have made in its interpretation of the 60-day rule concerning tenant-paid real estate expenses. Any other conclusion would enable an executive branch administrative agency to ignore or amend the plain language of a statute enacted by the legislature, in contravention of separation of powers.

For all these reasons we decline to extend the purely prospective ruling doctrine to decisions of the tax court.

B. Equitable Estoppel

We note that Kmart's argument presents some elements of equitable estoppel, although Kmart does not specifically refer to that doctrine. A governmental agency may be estopped from taking an enforcement action when the plaintiff demonstrates "[1] that the defendant, through his language or conduct, induced the plaintiff [2] to rely, in good faith, on this language or conduct [3] to his injury, detriment or prejudice." *See Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980) (numbering added). We have recognized that this doctrine can apply in cases where taxpayers rely on erroneous tax advice from the taxing authority. *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977).

Although Kmart may have relied on the tax court decisions for taxes payable in 2001 and 2002,[13] it cannot satisfy its "heavy burden" under the first element. The *Ridgewood* court explained that this requires a showing not only of error on the part of the government, but of "wrongful conduct." *Ridgewood*, 294 N.W.2d at 293. This "wrongful conduct" element has since been interpreted to require some degree of malfeasance. *In re Westling Mfg., Inc.*, 442 N.W.2d at 328, 332 (Minn. App. 1989); *see also Mesaba*, 258 N.W.2d at 880 (holding that county officer's erroneous tax advice was not sufficiently "culpable"); *City of Eden Prairie v. Liepke*, 403 N.W.2d 252, 253, 256 (Minn. App. 1987) (holding that defendant could argue the doctrine at his criminal trial, but only because the city approved of defendant's land use plans several times and then prosecuted him criminally for the very land use they approved). The tax court's good-faith interpretation of a statute, even if erroneous, would not rise to the level of malfeasance.

Further, equitable estoppel is generally applied only where the action giving rise to estoppel was taken by the administrative body that seeks to enforce a contrary rule. Here, Kmart does not claim to have relied on any actions of Stearns County, the taxing authority. Stearns County should not be estopped because of actions taken by the tax court.

The decision of the tax court is affirmed.

GILDEA, J., having not been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this matter.

CONCURRENCE/DISSENT

ANDERSON, Paul H., Justice (concurring in part and dissenting in part).

I concur in part and dissent in part. I agree with the majority that Kmart must, under Minn. Stat. § 278.05, subd. 6(a) (2002), provide the information at issue in this case. But I take issue with the majority's characterization of how the Minnesota Tax Court must respect its own precedent, and I disagree with the majority's decision to retrospectively apply our adoption of the tax court's new interpretation of Minn. Stat. § 278.05, subd. 6(a).

First, I write to clarify that an executive branch court such as the tax court, while not bound to follow its own precedent to the same degree as a judicial branch court, is still required to accord some respect to its own precedent. In its effort to make Kmart's reliance on tax court precedent appear unjustified, the majority presents only part of the story of the existing Minnesota case law on the issue of tax court precedent. For instance, the majority cites *In re Whitehead* for the proposition that Kmart's reliance on tax court decisions in previous Kmart cases was not reasonable, but on the contrary, *Whitehead* implies that some reliance on tax court decisions *is* justified, as "an agency may [not] abandon its own precedent without reason or explanation. * * * Failure to explain such a departure indicates that the agency's action is arbitrary and capricious." *In re Whitehead*, 399 N.W.2d 226, 229 (Minn. App. 1987).[14] In fact, the court of appeals in *Whitehead* went on to conclude that the agency's action *was* arbitrary and capricious because the agency had departed from its own precedent without explanation. *Id.* at 229-30. The court in *Whitehead* even overturned the agency judgment on that basis. *Id.*

Whitehead is not the only case holding that an agency cannot change its precedent capriciously.[15] Minnesota case law on this issue indicates that while agencies like the tax court are not bound to respect their own precedent to the same degree as a judicial court, neither can they cavalierly disregard their own precedent.[16] Moreover, federal case law overwhelmingly supports this position.[17]

I do not intend to imply that the tax court's new interpretation of Minn. Stat. § 278.05, subd. 6(a), is unreasonable, though I do believe that the tax court's failure to explain why it abruptly changed its position is violative of the general requirement laid down by federal courts and by our court of appeals that an agency must provide a "reasoned explanation" for a change of mind or position. *See, e.g., Stroe v. I.N.S.*, 256 F.3d 498, 503 (7th Cir. 2001). My intention in discussing the precedential value of tax court decisions is to clarify what the precedential value is. I am concerned that the majority may be downplaying the precedential value of tax court decisions in an effort to support its conclusion that Kmart's reliance on the two previous tax court decisions was unjustified.

I more definitively part company with the majority on the issue of retrospectivity. I conclude that we should follow the example of several federal courts in applying the prospective test formulated by the District of Columbia Circuit Court of Appeals for use in just this type of situation—when, due to an agency's abrupt shift of policy, justice would be better served by a prospective application of the agency's new interpretation of the law. *Williams Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 3 F.3d 1544, 1554 (D.C. Cir. 1993). Here, the majority's decision to adopt the tax court's new interpretation of Minn. Stat. § 278.05, subd. 6(a), retrospectively harms innocent taxpayers who

legitimately relied on a tax court precedent. Even more seriously, the majority's apparent conclusion that the tax court need not follow its own precedents and that prospective application of our adoption of the tax court's new interpretation of the law is not available leaves taxpayers in a no-man's-land of uncertainty—taxpayers may be penalized by the tax court for not following tax court precedent, or, if they follow those precedents, they may be punished by our court for doing so.

The D.C. Circuit Court has held that when an agency shifts its interpretation, fairness may require that the new rule should be applied prospectively to those subject to the new interpretation. *Williams Natural Gas Co.*, 3 F.3d at 1554. The D.C. Circuit Court applies a five-factor test to determine whether prospective application is appropriate:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id.; *see also Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003); *Farmers Tel. Co. v. F.C.C.*, 184 F.3d 1241, 1251 (10th Cir. 1999); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 392 (3d Cir. 1994).

In the case before us today, fairness requires that we apply a rule similar to the rule articulated by the D.C. Circuit Court. Here, the tax court disregarded its prior holding without explanation or excuse for its shift in position.[18] The court simply articulated an interpretation of Minn. Stat. § 278.05, subd. 6(a), which is directly contrary to that which it had previously given in two related Kmart tax cases. *See Kmart Corp. v. County of Douglas*, No. C7-00-309, 2001 WL 40361 (Minn. T.C. Jan. 11, 2001); *Kmart Corp. v. County of St. Louis*, Nos. C1-00-600670, CX-00-600666, C3-00-600671, C8-00-600665, 2001 WL 40370 (Minn. T.C. Jan. 11, 2001). This sudden shift in position makes the federal prospective application doctrine relevant. Moreover, the inequity of the majority's result is another reason why application of the federal prospective doctrine is appropriate. Today's outcome is simply unjust to the taxpayer. The tax court told Kmart at least twice in related previous Kmart cases that a tenant taxpayer need not produce the extra information at issue here. *Kmart Corp. v. County of Douglas*, 2001 WL 40361 at *2; *Kmart Corp. v. County of St. Louis*, 2001 WL 40370 at *3. And as the case law shows, despite the majority's assertion, some reliance on the holdings of the tax court is natural and justifiable.[19]

When we apply the D.C. Circuit Court's prospective application doctrine to this case, all five factors tilt in favor of prospective application, or at least in favor of allowing Kmart to submit the additional information. First, this case is one of first impression. Second, the new interpretation of the statute represents an abrupt departure from two prior tax court cases–given in the course of very similar cases with the same petitioner. Third, Kmart relied completely on the former rule. Fourth, Kmart will be irremediably burdened by retrospective application of the rule because its appeal will be dismissed based on its violation of the 60-day rule. Fifth, the

statutory interest in applying the 60-day rule in this instance is slight because allowing Kmart to offer the required additional information now would not significantly prejudice the state. A prospective application of the new interpretation of the law would simply require the tax court to allow Kmart's petition to proceed, as tax cases do every day.

The majority rejects this highly relevant federal doctrine, stating that the cases within which the doctrine has been applied have been cases in which the agencies have been involved in interpretation of their own rules or policies, not interpretation of a statute.[20] However, in regard to the federal prospective application doctrine, I view this as a meaningless distinction (and indeed, the majority does not attempt to explain why the difference would be important here). The federal prospective application doctrine was created to alleviate an injustice—to give relief to those citizens who reasonably relied on an agency's prior determination of the law. The injustice of repeatedly telling a petitioner that it need not produce certain information, then abruptly turning the tables on that petitioner, remains regardless of whether the injustice is the result of the interpretation of a rule or a statute. Additionally, an agency's interpretation of its own rule may be overturned by our court just as the agency's interpretation of the statute it administers may be; and a taxpayer must respect both the agency's rule and statutory interpretation until such interpretation is overturned by our court. *St. Otto's Home v. Minn. Dept. of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989). A taxpayer's reliance on the tax court's interpretation of a statute is therefore no less reasonable than the taxpayer's reliance on the tax court's interpretation of a rule. The outcome of this case is simply unfair, regardless of whether the taxpayer relied on the tax court's interpretation of a statute, a rule, or an agency policy.

Instead of applying the federal prospective application doctrine, the majority applies our purely prospective doctrine, which is generally confined to addressing changes in court case law, not agency case law. In support of its holding, the majority tries to make Kmart's reliance on two directly applicable tax court opinions appear to be unjustified.[21] But as noted above, Minnesota and federal case law indicate that agencies cannot overturn their prior judgments on a whim. Some reliance by Kmart is therefore justified.[22] More to the point, common sense indicates that reliance was justified and should have been expected. The tax court told Kmart twice, in cases just previous to this one, that it did not need to produce the information at issue here. Now Kmart is told that not only does it need to produce the information, but that its failure to do so earlier necessarily results in dismissal of its petition. The majority's technical analysis of the purely prospective doctrine ignores the heart and basis of the doctrine, which is that, sometimes, the retrospective application of a new rule results in great injustice. *See Spanel v. Mounds View Sch. Dist. No. 621*, 264 Minn. 279, 294, 118 N.W.2d 795, 804, (1962).

While I believe that this case does satisfy the purely prospective doctrine because Kmart's reliance was natural and reasonable, I also believe that this is exactly the type of case for which the federal courts have fashioned their prospective application doctrine. The federal prospective application doctrine was created to deal with the injustice that occurs when agencies abruptly change their interpretation of a law or rule upon which a person or entity had reasonably relied. With such doctrines available to us, there is no reason why we should permit this and future similar injustices to occur. Therefore, I would hold that our adoption of the tax court's new interpretation of Minn. Stat. § 278.05, subd. 6(a), should be applied prospectively.

[1] Section 278.05, subdivision 6(a), was amended in minor ways in 2003. Act of May 25, 2003, ch. 127, art. 2 § 19, 2003 Minn. Laws 731, 776. The 2002 version was applicable to the three property tax years (2000, 2001, and 2002) for which appeals in this case were taken.

[2] This makes Kmart a proper party to file the chapter 278 petition. Minn. Stat. § 278.01, subd. 1 (2004).

[3] In 2001, Kmart provided Stearns County a "net profit report," which describes broad categories of expenses that may include some related to the operation of the real estate. Although absent from the record, Kmart says it provided the same report in 2002. Kmart does not argue that the real estate expense figures in these reports satisfy the requirements of the 60-day rule. Thus we do not decide that issue.

[4] The dissent misconstrues our holding when it refers to the majority's "adoption of the tax court's new interpretation of Minn. Stat. § 298.05." Because we review the tax court's interpretation of the statute de novo, we do not defer to the tax court's interpretation but instead make our own interpretation.

[5] *See also* Appraisal Institute, *The Appraisal of Real Estate* 497, 501 (12th ed. 2001) ("To derive pertinent income and expense data, an appraiser investigates comparable sales and rentals of competitive income-producing properties of the same type in the same market. For investment properties, current and recent incomes are reviewed, and vacancy and collection losses and typical operating expenses are studied.").

[6] Because Kmart did not disclose any expense information, we do not address what level of detail might be minimally necessary to satisfy the 60-day rule where partial information is provided.

[7] As we noted in *Baird*, the terms "retroactive, nonretroactive, and prospective have been variously defined." 654 N.W.2d at 110 n.5. We understand Kmart's request to be for purely prospective application of our decision, that is, applying it to all future cases but not to this case.

[8] We are mindful that both *Douglas County* and *St. Louis County* involved Kmart leases similar or identical to the leases in this case.

[9] *Kmart Corp. (Anoka) v. County of Anoka*, 2004 WL 612777; *Kmart Corp. (Blaine) v. County of Anoka*, 2004 WL 612789; *Kmart Corp. (Columbia Heights) v. County of Anoka*, No. C3-01-2786.

[10] *See FACS of New Ulm LLC v. County of Brown*, No. CX-00-222, 2001 WL 40352 at *1 (Minn. T.C. Jan. 11, 2001) (holding that petitioner provided a "significant amount of material related to income and expenses"); *Cypress Semiconductor v. County of Hennepin*, Nos. TC-27376, TC-27033, 1999 WL 1253032 at *30 (Minn. T.C. Dec. 16, 1999) (holding that the 60-day rule did not apply to an owner-occupier because the property is not "income producing"); *Minn. Timberwolves Ltd. P'ship v. County of Hennepin*, Nos. TC-26329, TC-26856, 1999 WL 236600 at *1 (Minn. T.C. April 20, 1999) (involving a request for a subpoena for a non-party witness, not a 60-day rule requirement); *Menards, Inc. v. County of Sherburne*, No. C2-98-460, 1998 WL 668734 at *2 (Minn. T.C. Aug. 20, 1998) (holding owner occupied property not yet open for business with no rental income is not "income-producing property" within scope of the 60-day rule); *Aldrich S. Premises v. County of Dakota*, No. CX-95-7373, 1995 WL 516561 at *1 (Minn. T.C. Aug. 24, 1995) (holding the owner's income and expense data was not "available" to a tenant who leased only 25% of the property).

[11] For a brief discussion concerning the limited authority on the precedential nature of tax court decisions, see Jerome

A. Geis & Barry R. Greller, *The Minnesota Tax Court: The Taxpayer's Choice of Forum to Litigate a State Tax Liability*, 21 Hamline L. Rev. 407, 431 (1998) (noting that although not strictly bound by its own decisions, as a practical matter "the Tax Court follows its prior decisions unless provided with a good reason as to why the decisions are distinguishable or are no longer good law").

[12] Taxpayers petitioning for review of property assessments can elect to file in the district court in the county where the tax was levied. Minn. Stat. § 278.01, subd. 1. The tax court was created to provide a speedier and more efficient *alternative* forum for this purpose, not a substitute forum with lawmaking authority. *See Land O' Lakes Dairy Co. v. Village of Sebeka*, 225 Minn. 540, 547, 31 N.W.2d 660, 665 (1948).

[13] Because Kmart's 60-day rule submissions were identical for taxes payable in 2000, before any tax court decisions on the subject were filed, Kmart's reliance arguments are not strong.

[14] Agency law applies to the tax court because, as we have previously held, the tax court is an administrative agency of the executive branch. *Great Lakes Gas Transmission L.P. v. Comm'r of Revenue*, 638 N.W.2d 435, 437 n.5 (Minn. 2002).

[15] The majority cites one case, *Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656 (Minn. 2004), as characterizing a decision of the tax court as "nonbinding if it directly contradicts a previous holding of this court." The majority uses *Sprint* to support its conclusion that reliance on tax court opinions is unreasonable. However, *any* lower court's opinion that directly contradicted an earlier opinion of our court would be "nonbinding." Yet reliance on a court of appeals opinion is reasonable except in the rare circumstance where the court of appeals opinion contradicts an opinion of our court (or, where applicable, the United States Supreme

Court). I conclude that neither *Sprint* nor *Whitehead* supports the majority's conclusion that reliance on the tax court's previous Kmart opinions was unjustified.

[16] *See, e.g., In re Detailing Criteria and Standards for Measuring an Elec. Util.'s Good Faith Efforts in Meeting Renewable Energy Objectives under Minn. Stat. 216B.1691*, 700 N.W.2d 533, 539 (Minn. App. 2005) ("[A]lthough an agency is not bound to follow its past decisions, it must provide a reasonable basis for departure from precedent"); *Peoples Natural Gas Co., a Div. of InterNorth, Inc. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 348, 352-53 (Minn. App. 1983) (quoting *McHenry v. Bond*, 668 F.2d 1185 (11th Cir. 1982)) (stating that an agency may not abandon its own precedent without reason or explanation).

[17] *See, e.g., N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 182 (2d Cir. 2005) (quoting *Ramaprakash v. Fed. Aviation Admin.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003)) ("Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"); *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 229 (3d Cir. 2003) ("If an agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously."); *Ramaprakash v. Fed. Aviation Admin.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) ("[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation."); *Osei v. I.N.S.*, 305 F.3d 1205, 1210 (10th Cir. 2002) ("[T]he agency cannot, as a legislature can, reverse course without any explanation; its about-faces must be reasoned."); *Harrington v. Chao*, 280 F.3d 50, 58 (1st Cir. 2002) ("An agency's decision cannot simply depart from the agency's prior precedent without explaining its reasons for doing so."); *Stroe v. I.N.S.*, 256

F.3d 498, 503 (7th Cir. 2001) (requiring an agency contradicting its precedent to provide "a reasoned explanation for its change of mind"); *Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 495 (5th Cir. 1992) (agency determinations may be overturned if they "inexplicably [depart] from established policies"); *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1137-38 (8th Cir. 1988) (stating that "while [the agency] may change its position, it must give adequate reasons for doing so"); *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) ("An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.").

[18] The tax court did mention the previous tax court cases, but holds that they were decided on other grounds. It fails to address and discuss what the majority openly admits—that its holdings included a statement that Kmart need not produce the information required here.

[19] *See supra* notes 3-4 and accompanying text.

[20] Importantly, there is no evidence cited by the majority that the federal courts would not apply the federal prospective application doctrine to cases wherein an agency consistently interpreted a statute in one way, then abruptly shifted its interpretation. It may be that such a case simply has not yet come before the federal courts of appeals.

[21] The majority also overlooks the pertinent fact that the tax court rulings here were issued in two prior Kmart cases which are part of a series of Kmart cases. This case is also one of that series. The fact that these cases are all, in a sense, linked and are taking place at roughly the same time and with the same petitioner makes it more reasonable for Kmart to have relied upon the rulings of the tax court in the prior cases. For additional tax court cases in this series, which were decided after the expiration of the 60-day deadline

following Kmart's filing of its 2002 petition, see footnote no. 9 of the majority opinion.

[22] The majority further mentions that the tax court is not bound by its prior decisions if those prior decisions are in conflict with the express provisions of statutory law. But the issue here is not whether the tax court is forever bound to uphold a prior incorrect ruling; even this court may overturn its own prior holding that it discovers to be incorrect. The issue is whether the taxpayer is justified in relying on the holdings of the tax court. To say that a citizen was not justified in relying upon an opinion of a court simply because that opinion was later overturned would obviate the purely prospective ruling doctrine entirely.

STATE OF MINNESOTA TAX COURT
SEVENTH JUDICIAL DISTRICT
COUNTY OF STEARNS REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of Stearns,

Respondent.

ORDER

File Nos. CX-00-404
CX-01-1465
C2-02-1387

Dated: March 3, 2005

The Honorable George W. Perez, Chief Judge of the Minnesota Tax Court, heard Petitioner's Motion for Reconsideration on February 9, 2005, via telephone conference call.

Thomas R. Wilhelmy, Attorney at Law, Fredrikson & Byron, represented the Petitioner.

Gerald Von Korff, Attorney at Law, Rinke - Noonan, represented the Respondent.

The parties filed briefs. The matter was submitted to the Court for decision on February 23, 2005.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

Petitioner's Motion for Reconsideration is denied.

IT IS SO ORDERED.

BY THE COURT,

/s/ George W. Perez
George W. Perez, Chief Judge
MINNESOTA TAX COURT

DATED: March 3, 2005

Memorandum

Introduction

On February 9, 2005, the Tax Court granted Kmart Corporation's ("Petitioner") request to bring this Motion for Reconsideration of our January 4, 2005 Order, focusing the discussion on reconsideration to whether the holding of Kmart Corporation v. Stearns County, File Nos. CX-00-404 et al. (Minn. Tax Ct. Jan. 4, 2005) ("Stearns County") could be and should be applied prospectively. In Stearns County we held that tenant-paid real estate expenses are required to be produced under Minn. Stat. § 278.05, subd. 6 ("60 Day Rule"). Petitioner characterizes the holding to require that

"certain tenant-paid business expenses" be produced under the 60 Day Rule. Petitioner then argues that this holding constitutes a new principal of law departing from past precedent, thus making the application inequitable to those who had relied on past precedent and therefore, the Tax Court should either reverse its original holding, or at least, the Court should hold that Stearns County applies prospectively only. The County of Stearns ("Respondent") argues that the holding, consistent with the 60 Day Rule, requires that expenses related to the subject property be produced under the 60 Day Rule with failure to do so resulting in dismissal of the petition. Thus, Respondent argues that Stearns County does not create a new principal of law and therefore, it cannot be limited to a prospective application only.

The difference between Petitioner's and Respondent's arguments turns on whether the information produced is properly categorized as business expenses or subject property expenses. Petitioner relies on prior cases to argue for the creation of a bright-line itemization rule that would place certain items of information into the business income and expense category for every property assessment challenge subject to chapter 278 production requirements. We have not created a bright-line itemization rule. We find Stearns County does not constitute a new principle of law and adheres to the plain language of the 60 Day Rule and to the production requirements of BFW v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) ("BFW") and Kmart Corporation v. County of Becker, 639 N.W. 2d 856 (Minn. 2002) ("Becker").

I. Stearns County Does Not Represent a New Principle of Law under *Hoff* and Thus Cannot Be Limited to a Prospective Application

Petitioner mischaracterizes the holding of Stearns County, and in so doing, Petitioner attempts to argue that a new principle of law is created. We do not agree. The general rule is that dispositive decisions are to be given retroactive effect. Hoff v. Kempton, 317 N.W.2d 361, 363 (Minn. 1982). Under special circumstances or specific pronouncements by a court, the decision can be limited to a prospective effect under the three-factor test of Hoff. The factors of Hoff are as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355 (1971) (citations omitted).

We find that none of the factors are met in this case.

Stearns County does not establish a new principle of law as defined by Hoff, thus the first factor fails. The test primarily rests on an initial finding that the decision "must establish a new principle of law." Id. A new principle of law may be found in one of two ways: (1) clear past precedent on which litigants may have relied has been overruled by the decision; or (2) the decision reflects an issue of first impression whose resolution was not clearly foreshadowed. In Stearns County, we adhere to the precedent set in BFW and Becker. Moreover, the issue of production of subject property expenses under the 60 Day Rule is not a matter of first impression in any sense of that phrase.

Even if the first factor were met in Stearns County, the second and third factors clearly fail. The second factor requires an inquiry into the purpose of the rule established in the decision. Hoff, 317 N.W.2d at 364. The purpose of the 60 Day Rule is to provide an expedient decision in a property tax appeal. Becker, 639 N.W.2d at 859. Requiring that subject property expenses be timely provided under the 60 Day Rule, regardless of the various ways of categorizing the information, furthers the purpose of the rule. The third factor requires the court to conduct equitable inquiries and balancing. The Tax Court is not a court of equity. Carson Pirie Scott v County of Anoka, File No. C2-92-4858 (Minn. Tax Ct. Feb. 19, 1993): Klug v. County of Hennepin, File No. 10067 (Minn. Tax Ct. Mar. 7, 1991). Therefore, we do not address any notions of equity raised by Petitioner.

Because Stearns County does not create a new principle of law and thus fails the Hoff three-factor test, we decline to make a specific pronouncement that Stearns County should be applied prospectively. A discussion of the 60 Day Rule and an analysis of the Minnesota Supreme Court's holdings in BFW and Becker demonstrate that Stearns County adheres to the letter of the law.

II. Subject Property Expenses are Required to be Produced under the 60 Day Rule

The Tax Court has long adhered to the only demarcation created by the legislature in chapter 278 proceedings. The legislature determined that a petitioner is required to produce income and expenses relating to income-producing property.

Petitioner argues that it is not required to produce business expenses under the 60 Day Rule. Petitioner's Memorandum, p. 13. We agree. However, Petitioner argues that the items required in Stearns County are never required under the 60 Day Rule because these same items are always business expenses. Petitioner's argument rests on the underlying premise that real estate expenses and business expenses can be subjected to a bright-line itemization rule that will always categorize certain information as one or the other. The legislature did not contemplate such a bright-line rule. This Court has not created such an itemization rule in the past, and we decline to create a bright-line rule now.

Petitioner further argues that these expenses, even if characterized as subject property expenses, are not relevant to valuation. The 60 Day Rule does not contemplate a specific valuation process for the same reasons it does not itemize income and expenses relating to the subject property. What

is relevant for the 60 Day Rule is determined on a case-by-case basis. The definition of relevance for the purposes of the 60 Day Rule is broad so that the rule can evolve along with valuation processes and conform to individual subject properties challenging assessments. Indeed, establishing a valuation process during the 60 Day period, and thus limiting the information produced, would be premature and would restrict both the petitioner and the respondent from making an accurate valuation, thereby in direct contravention to the policy underlying the 60 Day Rule. Becker, 639 N.W.2d at 859-60. We decline to read a narrower definition of relevancy into the 60 Day Rule. Instead, we will continue to apply the holdings of BFW and Becker, which reason that for purposes of the 60 Day Rule, relevant information is any and all available information relating to the income-producing subject property.

A. The 60 Day Rule Requires that Subject Property Expenses be Produced.

The Tax Court is required to interpret statutes in a manner consistent with the intention of the legislature. Minn. Stat. § 645.16. If the text of the statute is clear, the legislature mandates that "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Id. The 60 Day Rule provides:

> Information, including ***income and expense figures***, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of

> the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a) (2002) (emphasis added).[1]

The plain language of the statute requires that income and expense figures for income-producing property be produced within the 60 Day period. The legislature does not define expense figures through a listing process; such a process would be futile, as every possibility simply cannot be accounted for, nor should it be attempted by this Court. Every subject property is different, thereby making every inventory of income and expense figures for each distinct. Despite case history addressing individual subject properties and amendments made to the statute, the legislature has not created an enumeration, and judicial creation of such a laundry list would be unwise and improper.

The 60 Day Rule unequivocally states that income and expenses relating to the subject property are to be produced. Furthermore, the Minnesota Supreme Court has affirmed the broad interpretation of the 60 Day Rule while acknowledging the burden upon petitioners to produce the required information. Becker, 639 N.W.2d at 680. A careful review of the Minnesota Supreme Court's reasoning in the seminal cases of BFW Company v. County of Ramsey and Kmart Corporation v. County of Becker suggests that a bright-line itemization rule is not appropriate and neither is a

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[1] As noted in the original Order, the statute was amended in 2003, but the applicable statute for the tax years at issue is the 2002 version. The major change, replacing "within 60 days" to "no later than 60 days," only further emphasizes the strictness of this rule.

narrower definition of relevancy that contemplates a valuation process at such an early stage in the assessment challenge.

B. BFW Interprets the Production Requirements of the 60 Day Rule Broadly.

In BFW, the Minnesota Supreme Court had its first opportunity to closely examine the text of the 60 Day Rule, and thus, the Court set the standard for the judicial interpretation of the statute.

The issue that the Minnesota Supreme Court addressed in BFW was the "extent of the statutory obligation imposed on a petitioner to provide information to the county" for compliance with the 60 Day Rule. Id. at 703. The Court held that the plain language of the statute clearly required the petitioner "to provide all information to which the petitioner has access, . . ." Id. at 705. The Court went further to state that "the statute's text required the petitioner to provide all information within its possession, even though the petitioner deems certain portions of that information to be incomplete or not fully accurate." Id. Finally, the Court held that "the statute clearly requires the petitioner to provide *any* of the required information within its possession . . ." Id. Undoubtedly, the 60 Day Rule requires the production of any and all information available relating to the subject property income and expenses, regardless of its accuracy or reliability.

The Minnesota Supreme Court had the opportunity to narrow the category of information to be provided under the 60 Day Rule and to limit the information to be produced to that which is relevant to a valuation process. However, the Court chose not to do either. Inaccurate and/or incomplete information does not lend itself to any type of bright-line

itemization rule. Additionally, the production of incomplete and/or inaccurate information also suggests a broad definition of relevance with no contemplation of a valuation process at so early a stage.

C. Becker Affirms the Holding of BFW and the Burden on the Petitioner To Produce Any and All Information under the 60 Day Rule

With the Minnesota Supreme Court's affirmation of the requirements of the 60 Day Rule laid out in BFW, the Court had another opportunity to examine and develop the rule in Becker. The petitioner in Becker failed to produce information relating to the contingent percentage rent clause in the lease during the 60 Day period. In reliance upon the plain language of the 60 Day Rule, the policy reasons behind the rule, and the holding in BFW, the Court declined to create a presumption in favor of petitioners because such a creation would shift the burden of production away from petitioners.

In its reasoning, the Minnesota Supreme Court follows the precedent established in litigation over the 60 Day Rule. The Court examined the 60 Day Rule in light of the petitioner's argument for a presumption, and the Court held the plain language of the statute was unambiguous. Id. at 705. Information is to be timely provided unless it is unavailable. Id. The Court then stated that the policy behind the rule is to provide an "adequate, speedy and simple remedy." Id. Strict enforcement of the rule is required to effectuate the legislative purpose behind this rule.

By declining to create a presumption in favor of the petitioner, the Court properly adhered to the burden allocation for chapter 278 proceedings. In re Objections & Defenses to Real Property Taxes for the 1970 Assessment,

306 Minn.184,186-87, 235 N.W.2d 390, 392 (1975). A petitioner seeking to challenge a property tax assessment must prove that the value placed on the subject property is incorrect. Schlieff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (1950). To prove an incorrect assessment, the petitioner must provide "any and all information" relating to the subject property. By refusing to create a presumption, the Court affirmed the holding of BFW. This affirmation supports the broad requirement of the information relevant to production under the 60 Day Rule.

D. The Policy Behind the 60 Day Rule Requires Upholding the Broad Requirements Set Forth in BFW and Becker.

The text of the 60 Day Rule is clear. The Minnesota Supreme Court has acknowledged in both BFW and Becker that the statute's plain meaning is unambiguous. BFW, 566 N.W.2d at 705; Becker, 639 N.W.2d at 859. Because the plain meaning is unambiguous, this Court must adhere to the letter of the law to effectuate the purpose of the chapter 278 production requirements. The purpose is to provide "an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the . . . court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed. . . ." BFW, 566 N.W.2d at 705 citing Continental Sales & Equip. Co. v. Town of Stuntz, 257 N.W.2d 546, 548 (Minn. 1997) (quoting Land O' Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 548, 31 N.W.2d 660, 665 (1948)). Strict enforcement of the 60 Day Rule advances the purpose intended by the legislature. Becker, 639 N.W.2d at 680.

Petitioner asserts that the language of the 60 Day Rule is ambiguous and should be interpreted in favor of the taxpayer. Petitioner's Memorandum, p. 5-6. This characterization of the statute ignores the reasoning and holdings of BFW and Becker. Petitioner urges the Tax Court to create an itemized list of business expenses that will never be required for production under the 60 Day Rule to clarify what it deems as ambiguous. If the laundry list cannot be created, Petitioner would have us narrow the relevant information for production by holding that the itemized list of expenses in this particular case would never be relevant to a valuation process. If we accept either of Petitioner's suggestions, we would be disregarding the letter of the law in exchange for Petitioner's proposed spirit of the law. Furthermore, the policy of the chapter 278 production requirements would be obliterated through such judicial activism.

Taxation is purely a function of the legislature. Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 224 (Minn. 1979). The Minnesota Supreme Court declined to soften the hard edges of the 60 Day Rule in Becker, and we also decline to do so. We leave it to the discretion of the legislature to determine whether further delineation of the difference between business and income expense is needed.

E. Summary of the 60 Day Rule Requirements

In summary, the Tax Court is bound by the plain language of the 60 Day Rule and the holdings in BFW and Becker. The 60 Day Rule requires the production of any and all information available relating to the subject property. To create a bright-line itemization rule would be to obliterate the broad production requirements. To contemplate a valuation process implicated by the 60 Day Rule and thus the

information relevant to be produced would also be to narrow the broad production requirements.

In addition, though not the dispositive issue in this case, Petitioner has intimated at the meaning of availability of information for a chapter 278 proceeding. Petitioner argues, in the alternative, that if the information is required, it is not available because such information is not regularly kept in the ordinary course of business. This assertion is sworn to in Petitioner's Affidavit in support of unavailability. Petitioners bring these claims for lower property assessments, so they must prove them[2] by producing the information.

III. Prior Tax Court Cases

Again, we emphasis that chapter 278 petitions differ extensively on their facts. We have addressed each case before us on its facts and merits and caution the use of the reasoning in individual cases to create rules of substance or procedure that are not sanctioned by the Tax Court. While we appreciate a petitioner's need for guidance in meeting the production requirements of the 60 Day Rule, a ruling for one subject property cannot be held to be dispositive for another subject property for all the reasons discussed above.

Petitioner argues that our case precedent has implemented a bright-line itemization rule for categorizing information that falls into business and subject property expenses. In light of our foregoing analysis of the plain language of the 60 Day Rule, BFW, Becker, and the policy implicated, the results of our prior cases are consistent.

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[2] Schlieff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (1950).

A. Menards v. County of Sherburne

In Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Ct. Aug. 20, 1998), respondent filed a motion to compel the discovery of sales and income information under the 60 Day Rule. The petitioner challenged the motion arguing that the subject property was not considered income-producing within the meaning of the 60 Day Rule. This Court held that the subject property was owner occupied and therefore, not subject to the production requirements of the 60 Day Rule. Any discussion of whether business income and expenses are not required under the 60 Day Rule was merely a restatement of the plain language of that rule.

B. Minnesota Timberwolves Limited Partnership v. County of Hennepin

In Minnesota Timberwolves Limited Partnership v. County of Hennepin File Nos. 263929, 26856 (Minn. Tax Ct. Apr. 20, 1999), the petitioner subpoenaed the records of a non-party witness; these records related to the business income and expenses for the Target Center. The Tax Court held that this subpoenaed income and expense information of the business was not relevant to the value of the subject property. For this particular case, we did not find the records subpoenaed to be relevant under the 60 Day Rule; however, we also noted that should our assumptions be incorrect, the non-party witness was required to turn over records to help complete the valuation. Our case specific holding and subsequent refusal to shut the door entirely to the subpoenaed business income and expense information demonstrates our continued understanding that a bright-line itemization rule cannot be formulated and what is relevant for production is determined on a case-by-case basis.

C. Kmart Corporation v. County of Otter Tail

In Kmart Corporation v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Nov. 16, 2000), the petitioner raised two issues in opposition to respondent's motion to dismiss under the 60 Day Rule. First, the petitioner argued that information it submitted in the 60 Day period was related to the income-producing portion of the store and that information requested by the county was related to the owner occupied portion of the store. In keeping with Menards, the Tax Court held that information relating to owner occupied property was not required for production under the 60 Day Rule.

Second, the petitioner argued that income and expenses relating to the business were not required under the 60 Day Rule. The Tax Court agreed stating that "the relevant income and expense information required to be produced under the 60 Day Rule is *income and expense information regarding the ownership and operation of the real estate*." Otter Tail at p. 6 (emphasis added). However, we also recognized that had a percentage rent clause been included in that particular lease, business income and expense would have affected the lease and that information would have been relevant for the production requirements of the 60 Day Rule.

Petitioner relies on the reasoning in Otter Tail to argue the similarities between its lease and the lease presented in Otter Tail. We correctly held that business expenses were not required to be produced. However, the facts of Otter Tail are not the facts before us, regardless of the relationship between the petitioner in that case and Petitioner in this case. Furthermore, Otter Tail was decided by the Tax Court prior to Becker. With the analysis of Becker squarely

before us now, we cannot make comparisons between the two cases.

D. The "Kmart Trilogy"[3]

Petitioner relies heavily on Kmart Corporation v. County of Douglas and Kmart Corporation v. County of St. Louis.[4] First and foremost, Petitioner never discusses the holdings or the reasoning from the Minnesota Supreme Court's final rulings on these cases. Petitioner only cites from the Tax Court's reasoning addressing these cases prior to the final disposition by the Minnesota Supreme Court. Based on long accepted rules of jurisprudence, it is inexcusable to disregard the Minnesota Supreme Court's reasoning for upholding the Tax Court in both of these cases.[5]

Nevertheless, Petitioner's arguments for the language used in the Tax Court cases prior to the final ruling by the Minnesota Supreme Court are misplaced for the same reasons mentioned in the discussion above for Minnesota Timberwolves and Otter Tail. Douglas and St. Louis dealt

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[3] Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002); Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002); Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002).

[4] These cases are two of three cases the Supreme Court reviewed on appeal together and issued opinions relating to each other. The primary case is Becker described in detail above.

[5] Petitioner notes that these cases went up to the Supreme Court on a "different issue not pertinent to the issue before this Court on reconsideration." Petitioner's Memorandum, p. 8. We disagree. The Supreme Court's holding in Becker is fundamental to our response on reconsideration.

with individual issues of the information produced in the 60 Day period regarding the percentage rent clause. In both cases, the petitioner failed to provide enough information to the respondent. The Minnesota Supreme Court referred to the reasoning set forth in Becker for its holdings in Douglas and St. Louis.

Contingency clauses, for example percentage rent clauses, demonstrate that a bright-line demarcation between business and subject property income and expenses cannot be easily drawn. In order for the percentage rent clause to be triggered, the business must exceed its anticipated revenue under the lease and in so doing, the business owes additional rent. Income and expenses relating to the business and relating to the subject property are dependent, yet the 60 Day Rule requires information about the contingency clause to be produced precisely because the business income and expenses have now become part of the subject property expenses. Yet, another lease without a percentage rent clause might not require such information to be provided under the 60 Day Rule.[6]

Petitioner has again interpreted the reasoning in both cases to create a bright-line itemization rule. We are stating now that such an itemization rule was not contemplated by the Tax Court. Whatever other statements or dicta that address non-dispositive issues in these cases should not be taken for judicial rule creation outside the scope of the applicable legislation. The dispositive issues in all three cases dealt with the percentage rent clauses, and these clauses serve as examples of how a bright-line itemization rule would lead to absurd results.

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[6] See the Hibbing property in St. Louis County.

E. The "Anoka Trilogy"[7]

The petitioners in all three Kmart Corp. v. Anoka County cases argued that information required under the 60 Day Rule was unavailable. We held that because the information was unavailable, it was not required to be produced during the 60 days. Because the issues were decided on availability alone, we find that the results in these cases are correct and the discussion on relevancy is dicta.

IV. Application to Stearns County

Based on our prior analysis and discussion of the production requirements of the 60 Day Rule, we find that our decision in Stearns County is correct. Petitioner argues that Stearns County departs from the Tax Court's application of the 60 Day Rule. On the contrary, Stearns County decisively adheres to BFW and Becker.

V. Conclusion

Valuation is an art, not a science. The information involved in a valuation process is complex and varies depending on the subject property. The legislature did not contemplate a valuation process because of the need for an evolving law. Tax policy underlying the chapter 278 production requirements stresses the need for speedy resolution allowing counties to establish budgets. Becker,

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[7] Kmart Corp. (Anoka) v. County of Anoka, File Nos. CX-01-2784 et al. (Minn. Tax Ct. Mar. 4, 2004), Kmart Corp. (Blaine) v. County of Anoka, File Nos. C1-00-2775 et al. (Minn. Tax Ct. Mar. 4, 2004) and Kmart Corp. (Columbia Heights) v. County of Anoka, File No. C3-01-2786 (Minn. Tax Ct. Mar. 4, 2004).

639 N.W.2d at 859. Therefore, petitioners challenging property assessments have the burden to produce information supporting their challenges and to timely produce it.

Whether or not the information is necessary for the purposes of valuation is determined after the 60 Day period. Relevance for a chapter 278 proceeding is any and all information available for the income-producing property. A bright-line itemization rule cannot be created to apply to every property assessment challenge. Given the policy set by the legislature and the precedent of BFW and Becker, a petitioner would be well-advised to produce all information rather than withhold when unsure about meeting the 60 Day Rule requirements.

The legislature set broad parameters for production. Petitioners may look to their leases for guidance on expenses relating to the subject properties. As our evaluation of cases has progressed regarding motions to dismiss under the 60 Day Rule, we have found leases to be helpful in the determination of subject property expenses, and we will continue to look at leases as a guide on whether the petitioners have met their burden under the 60 Day Rule.

We recognize that Petitioner in this case, and in the cases prior and currently before us, is advocating for its client. However, the Minnesota Supreme Court has unequivocally stated that tax litigation is not subject to traditional notions of discovery. Becker, 639 N.W. 2d at 859. Compliance for the purposes of the 60 Day Rule is not about finding the minimum to be produced. Compliance requires production of any and all information available to the petitioner seeking to have a reduction in the assessed value of its property. We will continue to enforce the 60 Day Rule strictly to effectuate the purpose of the statute. As the

Minnesota Supreme Court aptly stated in Becker, "[we] . . . decline to soften the 60 Day Rule and instead, leave the overall balancing of competing tax policy considerations to the legislative branch of government." Becker, 639 N.W. 2d at 861.

G.W.P.

STATE OF MINNESOTA TAX COURT
SEVENTH JUDICIAL DISTRICT
COUNTY OF STEARNS REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of Stearns,

Respondent.

ORDER GRANTING MOTION TO DISMISS

File Nos. CX-00-404
CX-01-1465
C2-02-1387

Dated: January 4, 2005

The Honorable George W. Perez, Chief Judge of the Minnesota Tax Court, heard this matter, on September 9, 2004, at the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr., Boulevard, St. Paul, Minnesota.

Thomas R. Wilhelmy, Attorney at Law, Fredrikson & Byron, represented the Petitioner.

Gerald Von Korff, Attorney at Law, Rinke - Noonan, represented the Respondent.

This matter was submitted to the Court for decision on October 4, 2004.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

Respondent's Motion to Dismiss is granted.

IT IS SO ORDERED. THIS IS A FINAL ORDER. A STAY OF FIFTEEN DAYS IS HEREBY ORDERED.

BY THE COURT,

/s/ George W. Perez
George W. Perez, Chief Judge
MINNESOTA TAX COURT

DATED: January 4, 2005

Memorandum

Procedural History

In December of 2001, Stearns County ("Respondent") filed its Motion to Dismiss the above-captioned property tax petition filed by Kmart Corporation ("Petitioner") based upon Minn. Stat § 278.05, subd. 6(a) ("the 60 Day Rule"). However, a number of events delayed the resolution of this Motion. First, there were several cases pending before the Minnesota Supreme Court involving Petitioner that might resolve or at least clarify the exact disclosure requirements under the 60 Day Rule. Petitioner then filed for bankruptcy in

January of 2002, which stayed pending Minnesota property tax petitions before the Minnesota Tax Court. Petitioner emerged from bankruptcy and Respondent renewed its Motion to Dismiss under the 60 Day Rule.

Respondent is moving for dismissal of Petitions from tax years in which taxes are due and payable in 2000, 2001, 2002, 2003 and 2004. Specifically, Respondent moves for the dismissal of Petitions from tax years in which taxes are due and payable in 2000, 2001, 2002 on the grounds that no expense information was submitted by Petitioner as required under the 60 Day Rule. This Motion, as initially filed and subsequently renewed, was for the Petition for tax year in which taxes are due and payable in 2000. For purposes of this Motion, the payable years 2000, 2001 and 2002 ("tax years at issue") will be consolidated and decided together.[1] However, tax years in which taxes are due and payable in 2003 and 2004 will not be decided in this Motion as additional facts are needed to determine whether or not Petitioner was in compliance with the 60 Day Rule.

Background

This case involves the Waite Park Kmart store in Stearns County, Minnesota. Petitioner filed a Petition in March of 2000 challenging the assessment of the subject property. Within 60 days, Petitioner provided certain information to the County Assessor. The information included a lease summary ("Lease Agreement") between Petitioner as tenant and Continental Properties Co. Inc., as landlord for the subject property.

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[1] Petitioner, during oral argument and Respondent, in its filing papers, agreed that for judicial economy and efficiency all tax years could be heard and decided together.

The Lease Agreement commenced on October 19, 1992. Under the Lease Agreement, the rent payable from its commencement and throughout its anticipated 25-year term is $567,150 per year, with no additional percentage or overage rent required. Further, under the Lease Agreement, Petitioner is required to pay certain real estate expenses as follows: Petitioner shall pay all real estate taxes. Lease Summary at 1; Petitioner shall reimburse the landlord for insurance premiums for the common areas. Lease Summary at 5; Petitioner shall at its own expense, carry out such repairs, replacements, improvements and maintenance as it deems necessary to keep the premises in good order. Lease Summary at 9; Petitioner shall pay all charges for utility raw materials (gas, water, sewage, telephone, electricity etc.) furnished to the premises during the lease term. Lease Summary at 10.

For the tax years at issue, Petitioner advised Respondent that there were no changes to the Lease Agreement. Petitioner further advised Respondent that "operating budgets for the real estate are not prepared in the ordinary course of business and are therefore unavailable." Saad Aff. ¶ 5.

Petitioner does not argue that it complied with the 60 Day Rule by providing all "income and expense figures, verified net rentable areas, and anticipated income and expenses . . .." Minn. Stat. § 278.05, subd. 6(a). Instead, Petitioner first argues that the expense information at issue is not required to be provided under the 60 Day Rule and recent case law. Petitioner further argues that even if such information is required it was unavailable to Petitioner. Respondent's argument simply put is that since Petitioner is required to pay certain real estate expenses under the Lease

Agreement, Petitioner must have such expense information available.

Issue

At issue in this case is whether real estate expenses are required to be provided under the 60 Day Rule. The 60 Day Rule provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.

Minn. Stat. § 278. 05, subd. 6(a) (2002).[2]

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[2] The statute was amended in 2003, but the applicable statute for the tax years at issue is the 2002 version.

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor no later than 60 days after the applicable filing deadline contained in section 278.01, subdivision 1 or 4. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless (1) the failure to provide it was due to the unavailability of the evidence at the time that the information was due, or (2) the petitioner was not aware of or informed of the requirement to provide the information.

Minn. Stat. § 278.05, subd. 6(a). (2003)

Analysis

Expense Information

The 60 Day Rule requires petitioners to provide "[i]nformation, including income *and expense* figures . . . ." Minn. Stat. § 278.05, subd. 6(a) (emphasis added). The Minnesota Supreme Court has held that the 60 Day Rule indeed requires petitioners to provide information relating to expenses. BFW Co. v. County of Ramsey, 566 N.W.2d 702, 705-06 (Minn. 1997). "[W]e hold that the statute required BFW to provide those income and expense figures within its possession on the date of the deadline . . . ." Id. at 705.

Petitioner argues that it is not required to produce its business expense information under the 60 Day Rule. We agree. We have long made the distinction between real estate expenses and business expenses. Petitioners are not required under the 60 Day Rule to provide information regarding the income and expense figures of the business operating in or on the subject property. Kmart Corp. v. County of Otter Tail, File No. C9-00-551 (Minn. Tax Ct. Nov. 16, 2000); Minnesota Timberwolves Ltd. P'ship v. County of Hennepin, File Nos. TC-26329, TC-26856 (Minn. Tax Ct. Order dated Apr. 20, 1999); Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Ct. Order dated Aug. 20, 1998). Instead, what is required is the income and expense figures regarding the operation of the real estate, not the business operated in or on the real estate. Kmart Corp. v. County of Otter Tail.

Petitioner then argues that in prior decisions, we have held that tenant expenses are not required under the 60 Day Rule. Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Jan. 11, 2001) *aff'd* 639 N.W.2d 863

(Minn. 2002); Kmart Corp. v. County of St. Louis, File Nos. C1-00-600670 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001) *aff'd* 639 N.W.2d 866 (Minn. 2002); Kmart Corp. (Anoka) v. County of Anoka, File Nos. CX-01-2784 et al. (Minn. Tax Ct. Order dated Mar. 4, 2004).[3] We do not agree. Petitioner misstates the holdings for each of these cases.

In Kmart Corp. v County of Douglas, while there is discussion regarding tenant-paid business expenses, the issue is whether petitioner is required to disclose if an escalator clause is triggered. We held that petitioner was required to disclose this income information and since petitioner did not do so, the petition was dismissed.

In Kmart Corp. v. County of St. Louis, the issue again, is whether petitioner is required to disclose if an escalator clause is triggered. In three of the four properties involved, petitioner failed to inform the County if the escalator clause was triggered. We held that petitioner was required to disclose this income information and since petitioner did not do so, the three petitions were dismissed.

In Kmart Corp. (Anoka) v. County of Anoka, the main issue is whether petitioner is required to provide income and expense information that is unavailable to petitioner. We held that the county failed to prove that the petitioner had

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[3] This order was issued along with Kmart Corp. (Blaine) v. County of Anoka, File Nos. C1-00-2775 et al. (Minn. Tax Ct. Mar. 4, 2004) and Kmart Corp. (Columbia Heights) v. County of Anoka, File No. C3-01-2786 (Minn. Tax Ct. Mar. 4, 2004). All three orders decided the same issue for three different properties.

such information, when petitioner stated under oath that it did not have the information.

These cases are distinguishable from the instant case and therefore not applicable. In the instant case, the Lease Agreement states the specific real estate expenses Petitioner is required to pay, including real estate taxes, maintenance and repairs, utilities, and insurance. The plain language of the statute and the Minnesota Supreme Court's holding in BFW requires real estate expense information to be produced.[4] We hold that tenant-paid real estate expenses are required to be produced under the 60 Day Rule.

We now determine whether the tenant-paid real estate expenses were available to Petitioner.

Availability

The 60 Day Rule states that dismissal is required unless "the failure to provide [required information] was due to the unavailability of the evidence at the time that the information was due." Minn. Stat. § 278.05, subd. 6(a). The Minnesota Supreme Court has stated that "the statute clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline." BFW, 566 N.W.2d at 705.

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[4] Furthermore, we note that the petitioner bears the burden of proving that an assessment is excessive. In re Objections and Defenses to Real Property Taxes, 306 Minn. 184, 186, 235 N.W.2d 390, 392 (1975). As such, the petitioner also bears the burden of providing evidence that refutes the original valuation. BFW, 566 N.W.2d at 705.

Petitioner argues that the information regarding tenant-paid real estate expenses was unavailable. Petitioner submitted an affidavit stating that Petitioner "does not prepare or maintain any statements or records that separately identify the operating expenses for the real estate of the subject property. Real estate-related expenses relating to the ownership or operation of the real estate are not maintained by Kmart as the tenant." Saad Aff. ¶ 5.

We have accepted similar affidavits and arguments in the past. See, e.g., Kmart Corp. v. County of Anoka, File Nos. C1-00-2775 et al. (Minn. Tax Ct. Order dated Mar. 4, 2004). Here, however, the Lease Agreement specifically requires Petitioner to pay certain real estate expenses. Such real estate expense information must be in Petitioner's possession when Petitioner is required to pay such expenses. As required under the Lease Agreement, Petitioner has paid real estate expenses in the past and can at least provide a history of the payments made. Petitioner's argument that the information is unavailable is not credible here. Where a lease requires a tenant to pay for real estate expenses that tenant may not claim "unavailability" under the 60 Day Rule.

Conclusion

We find that the tenant-paid real estate expense information that Petitioner failed to provide is required by the 60 Day Rule and was available to Petitioner. Respondent's Motion is granted and, therefore, the Petitions for the tax years in which taxes are due and payable for 2000, 2001 and 2002 are dismissed.

G. W. P.

STATE OF MINNESOTA

COUNTY OF DAKOTA

TAX COURT
FIRST JUDICIAL DISTRICT
REGULAR DIVISION

14041-14051 Aldrich
South Premises

ORDER

Petitioner,

vs.

File No. CX-95-7373

County of Dakota,

Dated: August 24, 1995

Respondent.

This matter was heard by the Honorable Dorothy A. McClung, Judge of the Minnesota Tax Court, on June 30, 1995, at the Dakota County District Court Facilities, in Hastings, Minnesota.

Jeffery J. McNaught, Attorney at Law, represented the Petitioner.

Kenneth A. Malvey, Assistant Dakota County Attorney, appeared for the Respondent.

The Court, having heard and considered the arguments of counsel, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. The Respondent's Motion to Dismiss the Petition based on Petitioner's failure to provide income and expense data pursuant to Minn. Stat. § 278.05, subd. 6 is denied.

IT IS SO ORDERED. BY THE COURT,

_____
Dorothy A. McClung, Judge
MINNESOTA TAX COURT

DATED: August 24, 1995

MEMORANDUM

Petitioner filed a Minn. Stat. ch. 278 petition in Dakota County on March 31, 1995. The subject property is income-producing property and, therefore, Petitioner was required to provide income and expense data within 60 days of filing its petition according to Minn. Stat. § 278.05, subd. 6. As of June 8, 1995, the Dakota County Assessor had not received the income and expense data and Respondent moves for dismissal of the petition.

Minn. Stat. § 278.05, subd. 6, provides in part:

> Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

According to the Affidavit of Jeffery J. McNaught, counsel for Petitioner, Petitioner is a lessee of approximately

25% of a strip retail property in Burnsville, Minnesota. The owners of the strip retail property are headquartered in Canada and contract with a separate company to manage the subject property. Mr. McNaught further states that Petitioner has requested income and expense data for the whole property from its owner but has not received the data. On May 30, 1995, Mr. McNaught advised the Dakota County Assessor that the statutorily required data was not available. Mr. McNaught also suggests in his affidavit that the Petitioner may seek "confidentiality assurances." The Court is unaware of any motions filed by Petitioner seeking a protective order pursuant to the Minnesota Rules of Civil Procedure.

Respondent points out that Petitioner failed to provide income and expense data on Petitioner's own lease, data which is obviously available to Petitioner. The Court notes that Petitioner leases approximately 25% of the subject property.

Petitioner argues that the data was not available within 60 days of filing the Petition and the Petition should not be dismissed. Petitioner also argues that the assessor was notified within the 60 days that the data was not available.

Based on the facts presented in this case, we conclude that the statutorily required data was not available to Petitioner.

D.A.M.

STATE OF MINNESOTA TAX COURT
FOURTH JUDICIAL DISTRICT
COUNTY OF HENNEPIN REGULAR DIVISION

Cypress Semiconductor,

Petitioner,

vs.

County of Hennepin,

Respondent.

ORDER DENYING DISMISSAL

File Nos. TC-27376
TC-27033

Dated: December 16, 1999

The Honorable Diane L. Kroupa, Chief Judge of the Minnesota Tax Court, heard Respondent's Motion to Dismiss at the Hennepin County District Court facilities in the Minneapolis City Hall, in Minneapolis, Minnesota on December 1, 1999.

Douglas J. Carney, Attorney at Law, with the Hanbery, Neumeyer & Carney Law Firm, represented Petitioner.

Robert T. Rudy, Senior Assistant Hennepin County Attorney, represented Respondent.

The Court, having heard and considered the arguments of counsel, the affidavits and memorandum, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. We deny Respondent's Motion to Dismiss under Minn. Stat. § 278.05, subd. 6, regarding income and expense data.

2. A pre-trial conference call shall be held on February 22, 2000 at 2:00 p.m. to establish the date certain trial regarding the subject's value as of January 2, 1997 and 1998.

IT IS SO ORDERED.

BY THE COURT,

Diane L. Kroupa, Chief Judge
MINNESOTA TAX COURT

DATED: December 16, 1999

MEMORANDUM

Petitioner manufactures semiconductors for personal computers, main frames, consumer electronics and other industries in the subject property located in Bloomington, Minnesota. The subject property consists of property identified by two property identification numbers: No. 12-

027-24-12-0031("PIN 31") and No. 12-027-24-12-0030 ("PIN 30").

Petitioner filed a ch. 278 petition on March 31, 1998 contesting the subject's value as of January 2, 1997[1] and filed a petition on March 22, 1999 contesting the subject's value as of January 2, 1998.[2] Petitioner did not provide income or expense data to the County within sixty days of filing either petition.

The County admits that Petitioner is the sole owner and occupier of the subject. Despite the subject being owner-occupied, however, the County brings this Motion to Dismiss for failure to provide certain financial information[3] "***for income-producing property***" to the assessor within sixty days of filing the petition under Minn. Stat. § 278.05, subd. 6(a) (the "60-Day Rule"). (Emphasis added.)

The County brings this Motion only with respect to PIN 30, not with respect to PIN 31 even though it is the same subject property. The County brings this Motion solely with respect to PIN 30 because PIN 30 is subject to a certain lease and sublease of the land and the lease of the improvements to be constructed upon the land (collectively the "Leases"). The Leases include a certain Ground Lease dated December 29,

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[1] Tax Court File No. TC-27033 involves the subject's value as of January 2, 1997.

[2] Tax Court File No. TC-27376 involves the subject's value as of January 2, 1998.

[3] The financial information includes "income and expense figures, verified net rentable areas, and anticipated income and expenses." Minn. Stat. § 278.05, subd. 6.

1994 by and between Petitioner (as landlord) and Sumitomo Bank Leasing and Finance, Inc. ("Sumitomo")(as tenant) regarding PIN 30. Under the Ground Lease, Sumitomo is required to pay Petitioner $1 as "Base Rent" for the first ten (10) years of the lease, which rent shall be increased, effective as of December 29, 2004, to the then fair market rent for comparable land located in a comparable section of Bloomington, Minnesota as Petitioner and Sumitomo shall agree. Petitioner and Sumitomo also entered into a certain Sublease of the Land and Lease of the Improvements dated December 29, 1994 by and between Petitioner (as tenant) and Sumitomo (as landlord) for a five-year term (the "Lease"). Under the Lease, Petitioner is required to pay Sumitomo "Base Rent," which is defined as an "annual amount equal to the product obtained by multiplying the Lease Investment Balance by the sum of the LIBOR Rate plus 47 basis points."

The County argues that, even if PIN 30 and PIN 31 are owner-occupied, we must dismiss the petitions as they relate to PIN 30 because PIN 30 is subject to the Leases. Under the County's theory, a lease of any sort requires that financial information be provided to the assessor under the 60-Day Rule and any property subject to a "lease" is by definition income-producing under the 60-Day Rule. Petitioner counters that the Leases are actually mortgages and security for financing, not true leases.

We find that whether the documents constitute a lease or a mortgage is not determinative for purposes of the 60-Day Rule. The issue is whether the property is income-producing. The more relevant inquiry for determining income-producing property is whether the property is owner-occupied.

We have found that owner-occupied property used as a corporate headquarters is not income-producing property.

Hubbard Milling Co. v. County of Blue Earth, File Nos. C4-93-641 and C6-93-642 (Minn. Tax. Ct. Order dated Feb. 1, 1994). We find Hubbard Milling controlling because it specifically addresses whether the property is income-producing. Although Hubbard Milling involved the appraisal exchange five days before trial under Minn. Stat. § 278.05, subd. 6(b) (the "5-Day Rule"), the 5-Day Rule applies only to "income-producing" property. Lyman Lumber Co. v. County of Hennepin, File Nos. TC-11620, TC-14736 and TC-17237 (Minn. Tax Ct. Order dated Feb. 5, 1993). We find no difference between "income-producing" for purposes of the 5-Day Rule or the 60-Day Rule. They are each contained in the same statute, Minn. Stat. § 278.05, subd. 6. The 60-Day Rule is in subd. 6(a) and the 5-Day Rule is in subd. 6(b).

We are convinced that the existence of a lease is not dispositive. Interestingly neither of the two cases upon which the County relies even involves an arm's length lease. Larson Leasing, Inc. v. County of Dakota, File No. C1-95-7231 (Minn. Tax Ct. Order dated Aug. 24, 1995) and T & L Investments v. County of Dakota, File No. C9-95-7347 (Minn. Tax Ct. Order dated Aug. 24, 1995). No written lease existed regarding the internal transfers made between the related organizations in T & L Investments. Although a written lease may have existed between the owner and the tenants in Larson Leasing, all the tenants were wholly owned by W. D. Larson, the principal of Larson Leasing, the owner of the property. In both cases we found payments between separate but related parties constitute "income" regardless of whether a lease existed.

Neither Larson Leasing nor T & L Investments is inconsistent with the relevant inquiry, however. Neither case involved owner-occupied property. In each case, we specifically found that, unlike Hubbard Milling, the property

was not owner-occupied. We found that the properties were owned and occupied by separate, but related, companies. Because it was not owner-occupied, the payments between the related parties constituted "income" for purposes of the 60-Day Rule. Property owned and occupied by separate companies is income-producing even if the separate companies are related.

Here we are faced with property that is owned and occupied by Petitioner. There is no entity separate and apart from the owner that occupies the subject. The owner and the occupier are the same. Petitioner does not rent PIN 30 anymore than Petitioner rents PIN 31, which the County concedes is not income producing and therefore not subject to dismissal. The only difference between PIN 30 and PIN 31 for purposes of this Motion is that PIN 30 is subject to the Leases.

We conclude that PIN 30 is not income-producing property. Petitioner was therefore not required to provide financial information under the 60-Day Rule. Accordingly, we deny Respondent's Motion to Dismiss. A pre-trial scheduling hearing shall be held on February 22, 2000 at 2:00 p.m. to establish the date certain trial regarding the value of the subject, both PIN 30 and PIN 31, as of January 2, 1997 and 1998.

D.L.K.

STATE OF MINNESOTA — TAX COURT

COUNTY OF HENNEPIN — REGULAR DIVISION

Doris C. Engdahl,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Docket No. 6600

Dated: February 26, 1996

The Honorable Diane L. Kroupa, Judge of the Minnesota Tax Court, heard this matter at the Hennepin County District Court facilities in the Minneapolis City Hall, in Minneapolis, Minnesota on November 8, 1995.

Appellant, Doris C. Engdahl, appeared pro se.

Thomas K. Overton, Assistant Attorney General, appeared for the Appellee.

The issue in this case is whether certain distributions from a profit-sharing plan are exempt from Minnesota income tax if the distributions are attributable to interest on federal government obligations.

Appellee filed a post-trial brief and Appellant was given until January 8, 1996 to file a reply brief. Appellant did not file a post-trial brief. This matter is considered submitted to the Court for decision on January 8, 1996.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Appellant is an employee of Rueben L. Anderson-Cherne, Inc. (the "Company") and a participant, with one other non-union employee, in the Company's profit-sharing plan (the "Plan").

2. The Company, as Plan Administrator, invested the assets of the Plan in obligations of the United States government such as Treasury bills, notes and bonds.

3. Appellant's account balance in the Plan represented 40.71% of the Plan's assets as of December 31, 1993.

4. The Plan earned treasury bill interest of $108,389.62 in calendar year 1993.

5. Appellant received a distribution of $43,474 under the Plan in 1993 and included this amount in her taxable income on both her federal and state income tax returns.

6. Appellant filed an amended 1993 Minnesota income tax return claiming that all of the Plan's distribution she received in 1993 should be considered exempt as United States government interest. The amount claimed to be exempt was calculated by multiplying Appellant's percentage share of the Plan's assets (40.71%) by the total United States government interest received by the Plan in 1993 ($108,389.62 or $44,125.41). Since this is more than the

actual distribution received, Appellant claimed that all of the distribution was exempt.

7. The Commissioner of Revenue ("Commissioner") denied Appellant's claim for Refund in an Order dated February 22, 1995 (the "Order").

8. The other participant in the Plan is Anthony L. Cherne. This Court concluded that the same distributions from the Plan to him were not exempt from Minnesota income tax. Cherne v. Commissioner of Revenue, Dkt. No. 6543 (Minn. Tax Ct. Sept. 21, 1995).

CONCLUSIONS OF LAW

1. The distributions Appellant received from the Plan are not exempt from Minnesota income tax as United States government interest.

2. The Order denying Appellant's Claim for Refund is hereby affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. THIS IS A FINAL ORDER. A STAY OF 15 DAYS IS HEREBY ORDERED.

BY THE COURT,

_____

Diane L. Kroupa, Judge
MINNESOTA TAX COURT

DATED: February 26, 1996

MEMORANDUM

Appellant is a participant in an employee profit sharing plan sponsored by Reuben L. Anderson-Cherne, Inc. (the "Company"). Appellant is one of two non-union employees of the Company still participating in the qualified profit sharing plan (the "Plan"). The other participant in the Plan, Anthony L. Cherne, contested the state income taxability of the distributions received. We concluded that the distributions from the Plan were not exempt from Minnesota income tax as United States government interest. Anthony Cherne v. Commissioner of Revenue, Dkt. No. 6543 (Minn. Tax Ct. Sept. 21, 1995).

This case is identical with Cherne. Cherne decided the precise issue raised in this case and it involved the same qualified profit sharing plan. The only differences between this case and the Cherne case are the percentage interests of the taxpayers-litigants, the amount of the distribution and the Plan years involved. These are immaterial differences.

Our decision is controlled by Cherne. No new arguments were submitted. According to their testimony at the hearing, Appellant and Mr. Cherne disagree with our Cherne decision and are attempting to relitigate this issue. We explained then and reiterate now that the appropriate recourse was to have appealed the Cherne decision if Appellant and Mr. Cherne believed that the court misapplied the law to the facts.

With no new arguments, theories or material facts, we are bound by our previous decision. Stare decisis dictates this result. Stare decisis promotes uniformity, stability and certainty in the law and "fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the

judicial process." Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609 (1991). We rely upon our review in Cherne of the applicable Minnesota Supreme Court decisions analyzing the exemption to conclude that Appellant's distributions from the Plan are not exempt from Minnesota income tax.

We affirm the Commissioner of Revenue's Order denying Appellant's claim for a refund.

D.L.K.

STATE OF MINNESOTA

COUNTY OF BROWN

TAX COURT
FIFTH JUDICIAL DISTRICT
REGULAR DIVISION

FACS of New Ulm LLC,

Petitioner,

vs.

County of Brown,

Respondent.

ORDER DENYING MOTION TO DISMISS

File No. CX-00-222

Dated: January 11, 2001

The Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, heard this matter on December 26, 2000 at the Brown County District Court Facilities, New Ulm, Minnesota.

J. Brian O'Leary, Attorney at Law, represented the Petitioner.

James R. Olson, Brown County Attorney, represented the Respondent.

The matter was submitted to the Court for decision on December 26, 2000.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. We deny Respondent's Motion to Dismiss under Minn. Stat.§ 278.05, subd. 6 regarding income and expense data.

IT IS SO ORDERED.

BY THE COURT,

Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: January 11, 2001

MEMORANDUM

The issue in this petition is the valuation of the subject property owned by Petitioner. The parties agree that the property is income producing and therefore subject to the information provision requirements of Minn. Stat. § 278.05, subd. 6(a), ("the 60 Day Rule"). Respondent moves for dismissal of the petition claiming insufficient production of information under the 60 Day Rule.

The parties agree that within the 60 days Petitioner provided some information: net rentable areas, "allocated"

income statements for the relevant years, depreciation expense reports, actual construction costs for building #8, and selected pages of previous lease agreements.

Subsequently, Respondent's appraiser informed Respondent that he would need additional information to complete his appraisal of the subject property. Respondent requested from Petitioner additional information: rent rolls for years 1998, 1999 and 2000, a capital asset ledger or depreciation schedule for all aspects of Petitioner's business in addition to the real estate, a site plan, a survey, and "accountant reviewed or audited" income statements. Petitioner then provided some of the additionally requested material. Petitioner however refused to provide information pertaining to its business operations, as distinct from the real estate, without a confidentiality agreement. Respondent refused to enter into a confidentiality agreement with Petitioner. Respondent then brought this motion to dismiss.

The 60 Day Rule provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a).

In response to the rule, Petitioner provided, in a timely manner, a significant amount of material related to income and expenses as well as rentable area. We find the material provided was a meaningful submission. Petitioner's appraiser was able to complete his appraisal and Respondent's appraiser was able to complete a "preliminary" appraisal, with the information provided. A petitioner is not required to provide audited financial statements under the 60 Day Rule. Doddway Investment Co. v. County of Dakota, File No. CX-97-7301 (Minn. Tax Ct. Order dated Aug. 1, 1997), *aff'd*, 578 N.W.2d 348 (Minn. 1998); Mendota Mall Assocs. v. County of Dakota, File No. CX-97-7300 (Minn. Tax Ct. dated Aug. 1, 1997), *aff'd,* 578 N.W.2d 350 (Minn. 1998). "Requiring property owners to provide audited statements would impose unwarranted and costly sanctions on taxpayers." Id. at 2. The information provided in this case is sufficient to comply with the requirements of the 60 Day Rule.

In addition, we have held that income and expense information pertaining to the underlying business operation is not normally subject to the requirements of the 60 Day Rule. See Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Ct. Order dated Aug. 20, 1998)(sales and income information of retail business not subject to 60-Day Rule production); Minnesota Timberwolves Ltd. P'ship v. County of Hennepin, File Nos. TC-26329 and TC-26856 (Minn. Tax Ct. Order dated Apr. 20, 1999)(subpoenaed income and expense information of business not relevant to the value of the property); Kmart Corp. v. County of Ottertail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 16, 2000)(relevant income and expense information is income and expense information regarding the ownership and operation of the real estate, not the business operated in or on the real estate); Kmart Corp. v. County of Douglas, File No.

C7-00-309 (Minn. Tax Ct. Order dated January 11, 2001) (relevant expense information is expense information affecting value of the real estate not expenses paid by tenant which do not affect owner's income stream).

Respondent does not dispute that it received the income and expense information but argues that its appraiser feels that he needs verification of the income and expense information provided by Petitioner before he can complete his final appraisal. That may well be. The opportunity to demand the verification information in this case is afforded to Respondent through a motion to compel production, not a motion to dismiss. Petitioner has complied with the 60 Day Rule as far as it is required to do so. The normal rules of discovery still apply. Information beyond that which is required by the 60 Day Rule should be obtained through the normal process of discovery.

Petitioner states that it is willing to provide the additional information under a Protective Order. The proper course for both parties is to bring a motion to compel production and/or a motion to grant a protective order.

R.R.K.

STATE OF MINNESOTA — TAX COURT
FIFTH JUDICIAL DISTRICT
COUNTY OF BLUE EARTH — REGULAR DIVISION

Hubbard Milling Company,

Petitioner,

vs.

County of Blue Earth,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

File Nos: C4-93-641-R
C6-93-642-R

Dated: February 1, 1994

This matter was heard by the Honorable Kathleen Doar, Judge of the Minnesota Tax Court, on December 7, 1993, at the Blue Earth County District Court Facilities, in Mankato, Minnesota.

Daniel J. Biersdorf, Attorney at Law, represented the Petitioner.

Ross E. Arneson, Blue Earth County Attorney, appeared for the Respondent.

The issue in this case is the January 2, 1992 and January 2, 1993 fair market value of real property improved with an owner- occupied office building.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Petitioner has sufficient interest in the property to maintain this petition; all statutory and jurisdictional require-ments have been complied with, and the Court has jurisdiction over the subject matter of the action and the parties hereto.

2. The subject property consists of two tax parcels identified as follows: R01-09-07-376-013 and R01-09-07-407-002.

3. The property is improved with a three-story office building used as the headquarters for Hubbard Milling Company. The building contains a full basement, a large portion of which is finished office space.

4. The basement and first two stories of the building were built in 1965. The ~~third story~~ was added in 1975.

5. A significant amount of asbestos fiber, a cancer causing material, is present in the ceiling surface throughout the building and in pipe insulation covering pipes between the floors.

6. During the summer of 1992, Hubbard Milling Company spent approximately $37,500 removing a portion of the asbestos in the ceiling of the second floor. It is estimated that the cost to remove the asbestos on January 2, 1993 was approximately $325,000.

7. The assessor placed an estimated market value (EMV) of $865,300 on the subject property on the January 2, 1992 and January 2, 1993 assessment dates.

8. Alan P. Leirness, MAI, Petitioner's appraisal witness, estimated the market value of the subject property to be $565,000 on January 2, 1992 and $600,000 on January 2, 1993.

9. Respondent presented no opinion of value at trial.

10. The Court accepts the opinion of value presented by Petitioner's expert.

CONCLUSIONS OF LAW

1. The assessor's estimated market value for the subject property as of January 2, 1992 shall be reduced on the books and records of Blue Earth County from $865,300 to $565,000.

2. The assessor's estimated market value for the subject property as of January 2, 1993 shall be reduced on the books and records of Blue Earth County from $865,300 to $600,000.

3. Real estate taxes due and payable in 1993 and 1994 shall be recomputed accordingly and refunds, if any, paid to Petitioner as required by such computations, together with interest from the original date of payment.

LET JUDGMENT BE ENTERED ACCORDINGLY. THIS IS A FINAL ORDER. A STAY OF 15 DAYS IS HEREBY ORDERED. BY THE COURT,

_____

Kathleen Doar, Judge
MINNESOTA TAX COURT

DATED: February 1, 1994

MEMORANDUM

Prior to the commencement of the trial, Respondent requested a ruling denying the admission of an appraisal prepared by Petitioner's expert because it was not delivered to the County until the morning of the trial. The County relied upon Minn. Stat. § 278.05, subd. 6. which excludes an appraisal if not exchanged five days prior to trial (the "Five Day Rule").

The Five Day Rule applies to "income-producing" property. Lyman Lumber Co. v. County of Hennepin, File Nos. TC-11620, TC-14736, TC-17237 (Minn. Tax Ct. Order dated Feb. 5, 1993). We denied Respondent's motion because the subject property is not income-producing property within the meaning of the Five Day Rule. Our decision rests upon the following: (1) the property is owner-occupied and used as a corporate headquarters; and (2) Mr. Leirness testified that in the appraisal community an "income-producing property" is one rented by an owner to a tenant (or tenants) under the terms of an arms length lease.

The subject property, located in Mankato, is improved with a three-story office building. The basement and first two floors of the building were built in 1965. The third story was added in 1975. The building contains asbestos fiber in the ceilings and pipe insulation.

Petitioner's expert, Alan Leirness, MAI, prepared an appraisal of the property utilizing the cost, income[1] and market approaches to value. He deducted the estimated asbestos abatement/containment cost from his initial cost, market and income approach indicated values to arrive at final values via each approach. He placed significant weight upon the income approach and reached a final conclusion of value of $565,000 on January 2, 1991 and $600,000 on January 2, 1992.

Jerry Sader, an Assistant Blue Earth County Assessor, testified for Respondent but presented no opinion of value. He reviewed Mr. Leirness' appraisal and indicated that he believed the information included in it is generally accurate. Mr. Sader agreed that Mr. Leirness' deduction of the cost of asbestos abatement from indicated value was reasonable. He had no opinion regarding the accuracy of Mr. Leirness' asbestos abatement figure.

Minn. Stat. § 271.06 provides that the assessor's estimated market value is prima facia valid and correct. Schleiff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (1950). The presumption disappears when a petitioner

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[1] Despite the fact that the subject property is not income-producing property within the meaning of the Five Day Rule, an income approach using "market" rent and expenses was utilized by Mr. Leirness. This is not inconsistent with our denial of Respondent's motion to exclude Mr. Leirness' appraisal. We believe the legislature enacted the Five Day Rule to insure that the taxing authority receives actual rental and expense information when responding to a chapter 278 petition valuation challenge of a property rented to a tenant under an arms length lease.

presents proof of value. Dachis v. County of Hennepin, File No. 3164 (Minn. Tax Ct. Nov. 20, 1984). Mr. Leirness, an experienced appraiser, presented a well-supported opinion of value. Blue Earth County presented no opinion of value. We accept the only opinion presented and find the January 2, 1992 value of the subject property to be $565,000 and the January 2, 1993 value to be $600,000.

K.D.

STATE OF MINNESOTA

COUNTY OF ANOKA

TAX COURT
TENTH JUDICIAL DISTRICT
REGULAR DIVISION

Kmart Corporation (Anoka),

Petitioner,

vs.

County of Anoka,

Respondent.

ORDER DENYING MOTION TO DISMISS

File Nos. CX-01-2784
C5-02-2881
C8-03-4232

Dated: March 4, 2004

The Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard this matter, on November 21, 2003, at the Anoka County Courthouse, Anoka, Minnesota.

Laurie J. Miller and Thomas R. Wilhelmy, Attorneys at Law, Fredrikson & Byron, P.A., represented the Petitioner.

Thomas G. Haluska, Assistant Anoka County Attorney, represented the Respondent.

The parties submitted briefs. All the parties consented to a two week extension of the three month deadline for decision due to illness.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

Respondent's Motion to Dismiss is hereby denied.

BY THE COURT,

Kathleen H. Sanberg, Judge
MINNESOTA TAX COURT

DATED: March 4, 2004

Memorandum

Anoka County's ("Respondent") Motion to Dismiss the Petition was filed on October 15, 2003, and amended on October 16, 2003 (collectively, the "Motion"). Respondent moves for dismissal of Petitioner's petitions contesting its property taxes for the Anoka Kmart Store for failure to provide information required under Minn. Stat.§ 278.0 5, Subd. 6 (a) (the "60 Day Rule").

Background

Petitioner filed Minn. Stat. § 278 petitions for taxes payable in 2000, 2001, 2002 and 2003, challenging the property tax assessment for its Anoka store (the "Subject Property"). As of the date of the assessments at issue,

Petitioner was a tenant in the Subject Property. After the Motion was filed, Petitioner dismissed Tax Court File No. C1-00-2758.

The 60 Day Rule

At issue in this case is whether the information produced by Petitioner is sufficient for compliance with the 60-Day Rule. The 60 Day Rule states in relevant part:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.

Minn. Stat. § 278. 05, subd. 6(a).

It is uncontested that the Subject Property was income-producing on the assessment dates at issue.

By letter dated May 18, 2000, Petitioner sent certain information to the County Assessor in an effort to comply with the 60 Day Rule. Further information was sent to the Assessor on April May 24, 2001, May 21, 2002, and June 23, 2003. The information provided included lease terms, lease supplemental information, net profit reports, and site drawings. In the May 24, 2001, letter and subsequent letters, Petitioner included a copy of the net profit report for the Subject Property and stated the level of sales for purposes of

calculating the percentage rental payment. This letter states that there have been no changes to the other leases previously provided to Respondent. The letter also states that "[w]e are advised by our client that operating budgets for the real estate are not prepared in the ordinary course of business and are therefore unavailable." Finally, the letter includes the statement that "[t]his information supplements the information previously provided to you."

Analysis

In its Motion, Respondent states that Petitioner failed to provide information required under the 60 Day Rule, implying that no information was provided. The Affidavit of Scott Varner, City Assessor for the City of Anoka, attached to the Motion, however, states that Petitioner provided a great deal of information. At the hearing on the matter, Respondent did not argue that no information was provided, rather, it argued that the information provided was insufficient. Specifically, Respondent argued that income and expense information was either not provided or insufficient and that certain sublease information was not provided or insufficient.

Petitioner asserts that the information it provided within 60 days is sufficient to comply with the requirements of the 60 Day Rule. Petitioner provided information regarding the terms of its lease with the landlord, current and anticipated income, and a net profit report on Kmart's store operations. The lease called for an additional percentage rent to be paid if the tenant (Petitioner) reached certain sales targets. This sales information was provided to Respondent.[1]

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[1] Information was not provided for 2000, which Petitioner acknowledged in dismissing its 2000 petition.

Next, Petitioner argues that because it was a tenant, it did not have, and was not required to provide, information regarding the real estate income and expenses which it did not keep in the ordinary course of its business and as such, this information was unavailable. Finally, Petitioner argues that sublease information is not required to be produced under the 60 Day Rule.

The Minnesota Supreme Court in BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) stated regarding the 60 Day Rule: "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access . . . ." Here, Respondent argues that Petitioner did not turn over all income and expense information. In response to the Motion, Petitioner provided copies of documents provided to the Assessor and asserts that the information was sufficient. Further, to the extent that information was not provided, Petitioner argues that it was not available.

Percentage Rent Clause

We first turn to the percentage rent clause. Regarding the percentage rent, Petitioner provided the lease and the sales information which showed that the percentage rent clause was triggered and sufficient information to determine the rent to the landlord. Thus, the Petitioner did not run afoul of the holdings of Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002); Kmart Corp v. County of Douglas, 639 N.W.2d 863 (Minn. 2002.); and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002) ("Kmart Trilogy") requiring specific information about the triggering of a percentage rent clause.

Income and Expense Information

Next, we analyze the sufficiency of the income and expense information provided. As a tenant, Petitioner maintains a record only of its business operations; it does not maintain records of the operation of the real estate and thus, asserts that that information is unavailable. While Respondent maintains that Petitioner should have the information, it does not show that Petitioner has the information. Under the 60 Day Rule, if information is unavailable, it need not be produced. Further, for the business income and expenses, as we stated in Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001), "because under normal situations the tenant business data, including expenses relating to the real estate that are paid by the tenant, is not useful in appraising the market value of the property, it is not required to be provided under the 60 Day Rule." Id.; Kmart v. County of Ottertail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18, 2000). Further, where income and expense information relating to ownership or operation of the real estate were not available to Petitioner as tenant, we have held that they do not need to be produced for purposes of the 60 Day Rule. Id. We have also held that tenant expenses, including tenant paid insurance, utilities, common area maintenance and repairs are not required under the 60-day rule. "Since other operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property." Kmart Corp. v. County of St. Louis, File No. C1-006-6700 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001) citing Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001).

Here, according to the Affidavits filed by Petitioner, it did not keep real estate operating expense information or income information beyond what was produced. According to Petitioner, this information was, therefore, unavailable. If information is unavailable, it is not required to be produced under the 60 Day Rule. Respondent has failed to show that such information was available during the 60 Day Rule period; and thus, Petitioner has met its burden under the 60 Day Rule. We note that Respondent may still obtain the information through discovery, when and if it becomes available to Petitioner later.

Anticipated Income and Expenses beyond Year at Issue

Next Respondent argues that the anticipated income and expense information provided was insufficient because it did not extend beyond the year at issue. Petitioner argues that for purposes of the 60 Day Rule, only information for the year at issue must be provided. We agree. The 60 Day Rule does not state the time period for which anticipated income and expenses must be provided, but given that a Section 278 petition covers only a one year period, it would not be logical to require data beyond this one year period for purposes of the 60 Day Rule. Because the purpose of the 60 Day Rule is to ensure that a county receives the information it needs to begin its valuation of the property in a timely fashion, we find that the anticipated income and expenses for the year at issue are required to be produced under the 60 Day Rule. Further information about income and expenses for other years may be obtained during discovery. Here, Petitioner provided the information for each of the years at issue as required.

Sublease information

The Respondent also complains that Petitioner did not provide sufficient sublease information. In Kmart Corp. v. County of Itasca, File No. CX-00-692 (Minn. Tax Ct. July 11, 2001) we held that the 60 Day Rule does not require a tenant to provide information regarding its subleases when the subleases do not impact the income to the landlord. Here, Petitioner argues that it provided substantial information regarding the subleases, even though it was not required. We agree. The Respondent's assertion that it should have been supplied with more subtenant information is without merit as Respondent has not shown that in this case the sublease information would have any impact on the income to the landlord.

Conclusion

For the reasons stated above, we find Respondent has failed to prove that Petitioner did not comply with the 60 Day Rule. Therefore, we deny Respondent's Motion to Dismiss.

K. H. S.

STATE OF MINNESOTA

COUNTY OF ANOKA

TAX COURT
TENTH JUDICIAL DISTRICT
REGULAR DIVISION

Kmart Corporation (Blaine),

Petitioner,

vs.

County of Anoka,

Respondent.

ORDER DENYING MOTION TO DISMISS

File Nos. C1-00-2775
C1-01-2785
C2-02-2885
C1-03-4234

Dated: March 4, 2004

The Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard this matter, on November 21, 2003, at the Anoka County Courthouse, Anoka, Minnesota.

Laurie J. Miller and Thomas R. Wilhelmy, Attorneys at Law, Fredrikson & Byron, P.A., represented the Petitioner.

Thomas G. Haluska, Assistant Anoka County Attorney, represented the Respondent.

The parties submitted briefs. All the parties consented to a two week extension of the three month deadline for decision due to illness.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

Respondent's Motion to Dismiss is hereby denied.

IT IS SO ORDERED.

BY THE COURT,

Kathleen H. Sanberg, Judge
MINNESOTA TAX COURT

DATED: March 4, 2004

Memorandum

Anoka County's ("Respondent") Motion to Dismiss the Petition was filed on October 15, 2003, and amended on October 16, 2003 (collectively, the "Motion").Respondent requests that the Petitions filed by Petitioner contesting its property taxes for the Blaine Kmart Store be dismissed for failure to provide information required under Minn. Stat.§ 278.0 5, Subd. 6 (a) (the "60 Day Rule").

Background

Petitioner filed Minn. Stat. § 278 petitions on May 31, 2000, April 2, 2001, March 27, 2002, and April 29, 2003, challenging the property tax assessment for its Blaine store

(the "Subject Property"). The Petitions cover the Subject Property for taxes payable in 2000, 2001, 2002 and 2003.

The 60 Day Rule

At issue in this case is whether the information produced by Petitioner is sufficient for compliance with the 60 Day Rule. The 60 Day Rule states in relevant part:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.

Minn. Stat. § 278. 05, subd. 6(a).

It is uncontested that the Subject Property was income-producing on the assessment dates at issue. As of the assessment dates at issue, Petitioner was a tenant in the Subject Property.

By letter dated May 24, 2000, Petitioner sent certain information to the County Assessor in an effort to comply with the 60 Day Rule. The following documents were supplied to the assessor's office on or about May 26, 2000: Information sheet summarizing lease terms, lease amendment and lease renewal, sublease between Kmart and Penske Auto Centers, summary of sublease with Chuck E Cheese. While some of the information indicates that there had been a

percentage rent provision in the lease previously, the Amended and Restated Lease dated 1994 does not include such a provision.

On May 24, 2001, Mr. Wilhelmy submitted a letter to the Assessor which enclosed a copy of the net profit report for the subject property and stated the level of sales for purposes of calculating the percentage rental payment. The letter states that there have been no changes to the other leases previously provided to the County. The letter also states that "We are advised by our client that operating budgets for the real estate are not prepared in the ordinary course of business and are therefore unavailable." Finally, the letter also states that "This information supplements the information previously provided to you." Further information was received on May 24, 2001, which included a net profit report and the gross sales for the year 2000 for calculating percentage rent. Monthly income from certain subtenants, including Brown Group and CEC Entertainment /Showbiz Pizza was included. Additional information and updates were provided for subsequent years at issue as well.

Analysis

Respondent moves for dismissal asserting that Petitioner did not comply with the 60 Day Rule. Respondent alleges in the Motion that Petitioner did not provide any information, including income and expense figures, verified net rentable areas, and anticipated income and expenses. Respondent's Affidavit from Diana Stellmach, the Anoka County Deputy Assessor attached to the Motion states, however, that substantial information was produced but that 1) sublease information was not provided, specifically for Chuck E Cheese and for a shoe store- which had both included percentage rent but for which gross sales

information was not provided; and 2) income and expense information was not provided. In oral argument, Respondent did not argue that no information was provided, but, rather, that the information provided was insufficient under the 60 Day Rule.

Petitioner argues in response that the information timely provided was sufficient. In 2000, Petitioner provided lease information setting forth the base rent, and excerpts of the lease. In each of the following years, Kmart notified County that the lease terms had not changed. According to Petitioner, the original lease of the subject property included a percentage rent provisions, but this was converted to a flat fee basis in 1994. Petitioner also provided information regarding its subleases as well as copies of its net profit report, or Profit and Loss Statement, even though it maintains that this is not required under the 60 Day Rule.

Income and Expense: Percentage Rent

The Minnesota Supreme Court in BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) stated: "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access . . . ." Here, Respondent argues that Petitioner has not supplied all information; Petitioner argues that it has. Under Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002); Kmart Corp v. County of Douglas, 639 N.W.2d863 (Minn. 2002.); and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002) ("Kmart Trilogy"), specific information about the triggering of a percentage rent clause must be provided under the 60 Day Rule. Here, Respondent argues that it is unclear whether Petitioner's lease contained such a percentage rent clause and Petitioner's failure to provide information runs afoul of the requirements of the 60 Day

Rule and the Kmart Trilogy. With the exception of the 2000 assessment year, for which the petition was voluntarily dismissed, Petitioner asserts that there is a fixed rent and the lease information provided states the rent due. If Respondent was confused, Petitioner argues, that does not mean that Petitioner has failed to sustain its burden under the 60 Day Rule. We agree. The 60 Day Rule only requires that the information be provided. Here, there is no argument that the rent information was hidden or that the rent amount could not be determined, as was the situation in the Kmart Trilogy. Rather, the amount of the rent to be paid was stated in the lease and was provided to Respondent. This is sufficient to meet the requirements of the 60 Day Rule.

Other Income and Expense Data

Respondent argues that Petitioner did not turn over all income and expense information. At oral argument, Respondent argued specifically that Petitioner failed to state the amount of real estate taxes paid by Petitioner to Respondent, which was required under the lease. Petitioner maintains that the real estate tax information is within the records of the County Assessor.

First, unlike other information which may be contained in other county records outside of the Assessor's office, the amount of real estate taxes paid is readily accessible and within the province of the County Assessor. We will not dismiss these Petitions because Petitioner did not provide this information

Next, we analyze the sufficiency of the income and expense information provided. As a tenant, Petitioner maintains a record only of its business operations; it does not maintain records of the operation of the real estate and thus,

asserts that that information is unavailable. While Respondent maintains that Petitioner "should" have the information, it does not show that Petitioner has the information. Under the 60 Day Rule, if information is unavailable, it need not be produced. Further, for the business income and expenses, as we stated in Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan.11, 2001) "because under normal situations the tenant business data, including expenses relating to the real estate that are paid by the tenant, is not useful in appraising the market value of the property, it is not required to be provided under the 60 Day Rule." Id.; Kmart v. County of Ottertail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18. 2000). Further, where income and expense information relating to ownership or operation of the real estate were not available to Petitioner as tenant, we have held that they do not need to be produced for purposes of the 60 Day Rule. Id. We have also held that tenant expenses, including tenant paid insurance, utilities, common area maintenance and repairs are not required under the 60-day rule. "Since other operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant do not reduce the income to the landlord, those expense are not relevant in calculating the value of the property." Kmart Corp. v. County of St. Louis, File No. C1-006-6700 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001) citing Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan.11, 2001).

Here, According to the Affidavits filed by Petitioner, it did not keep real estate operating expense information or income information beyond what was produced. According to Petitioner, this was information was, therefore, unavailable. If information is unavailable, it is not required to be produced under the 60 Day Rule. Respondent has failed

to show that such information was available during the 60 Day Rule period; and thus, Petitioner has met its burden under the 60 Day Rule. We note that Respondent may still obtain the information through discovery, when and if it becomes available to Petitioner later.

Anticipated Income and Expenses beyond Year at Issue

During the hearing on the Motion, Respondent argued that the anticipated income and expense information provided was not sufficient because it did not extend beyond the year at issue. Petitioner argued that for purposes of the 60 Day Rule, only the information for the year at issue must be provided. We agree. The 60 Day Rule does not state the time period for which anticipated income and expenses must be provided, but given that a Section 278 petition covers only a one year period, it would not be logical to require data beyond this one year period for purposes of the 60 Day Rule. Because the purpose of the 60 Day Rule is to ensure that a county receives the information it needs to begin its valuation of the property in a timely fashion, we find that the anticipated income and expenses for the year at issue are required to be produced under the 60 Day Rule. Further information about income and expenses for other years may be obtained during discovery. Here, Petitioner provided the information for each of the years at issue as required.

Sublease information

The Respondent also complains that Petitioner did not provide sufficient sublease information. In Kmart Corp. v. County of Itasca, File No. CX-00-692 (Minn. Tax Ct. July 11, 2001) we held that the 60 Day Rule does not require a tenant to provide information regarding its subleases when

the subleases do not impact the income to the landlord. Here, Petitioner argues that it provided substantial information regarding the subleases, including information regarding the shoe store and Chuck E Cheese, even though this was not required. We agree. Respondent's assertion that it should have been supplied with more subtenant information is without merit as it has not shown that the information would have any impact on the income to the landlord. Further, while certain subtenant lease may have had a percentage rent clause payable to Petitioner, Respondent failed to show that this was over and above the base rent and would have any impact on the landlord's income.

Conclusion

For the reasons stated above, we find Respondent has failed to prove that Petitioner did not comply with the 60 Day Rule. Therefore, we deny Respondent's Motion to Dismiss.

K. H. S.

STATE OF MINNESOTA

COUNTY OF ANOKA

TAX COURT
TENTH JUDICIAL DISTRICT
REGULAR DIVISION

Kmart Corporation,
(Columbia Heights)

Petitioner,

vs.

County of Anoka,

Respondent.

ORDER DENYING MOTION TO DISMISS

File No. C3-01-2786

Dated: March 4, 2004

The Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard this matter, on November 21, 2003, at the Anoka County Courthouse, Anoka, Minnesota.

Laurie J. Miller and Thomas R. Wilhelmy, Attorneys at Law, Fredrikson & Byron, P.A., represented the Petitioner.

Thomas G. Haluska, Assistant Anoka County Attorney, represented the Respondent.

The parties submitted briefs. All the parties consented to a two week extension of the three month deadline for decision due to illness.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

Respondent's Motion to Dismiss is hereby denied.

IT IS SO ORDERED.

BY THE COURT,

/s/ Kathleen H. Sanberg, Judge
Kathleen H. Sanberg, Judge
MINNESOTA TAX COURT

DATED: March 4, 2004

Memorandum

Anoka County's ("Respondent") Motion to Dismiss was filed on October 15, 2003, and amended on October 16, 2003 (collectively, the "Motion"). Respondent requests that the Petitions filed by Kmart Corporation ("Petitioner") contesting its property taxes for the Columbia Heights Kmart Store be dismissed for failure to provide information required under Minn. Stat. § 278.0 5, subd. 6 (a) (the "60 Day Rule").

Background

Petitioner filed Minn. Stat. § 278 petitions on March 31, 2000, and April 2, 2001, challenging the property tax assessment for its Columbia Heights store (the "Subject Property"). The Petitions cover the Subject Property for

taxes payable in 2000 and 2001. Petitioner voluntarily dismissed file number C3-00-2776 after receipt of the Motion. The case here at issue is file number C3-01-2786 for taxes payable in 2001.

The 60 Day Rule

At issue in this case is whether the information produced by Petitioner is sufficient for compliance with the 60 Day Rule. The 60 Day Rule, states in relevant part:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.

Minn. Stat. § 278. 05, subd. 6(a).

It is uncontested that the Subject Property was income-producing on the assessment date at issue. As of the date of assessment, January 2, 2000, Petitioner was a tenant in the Subject Property.

By letter dated May 24, 2000, Petitioner sent certain information to the County Assessor in an effort to comply with the 60 Day Rule. The following documents were supplied to the County Assessor's office on or about May 23, 2000: Information sheet summarizing lease terms including selected lease provisions and a site drawing, lease term,

Amendment to Lease, lease renewal, sublease between Kmart and Penske Auto Centers, summary of sublease with Old American Pottery company (including its extension and termination), and information regarding ground lease with Arby's. Other information was provided regarding leases which were no longer effective. On May 24, 2001, Mr. Wilhelmy submitted a letter to the County Assessor which enclosed a copy of the net profit report for the Subject Property and stated the level of sales for purposes of calculating the percentage rental payment. The letter states that there have been no changes to the other leases previously provided to Respondent. The letter also states that "[w]e are advised by our client that operating budgets for the real estate are not prepared in the ordinary course of business and are therefore unavailable." Finally, the letter includes the statement that "[t]his information supplements the information previously provided to you."

Analysis

Respondent moves for dismissal on the grounds that Petitioner did not comply with the 60 Day Rule alleging that Petitioner did not timely provide any information, including income and expense figures, verified net rentable areas, and anticipated income and expenses. Respondent's Affidavit from Diana Stellmach, Anoka County Deputy Assessor, states, however, that information was produced but that that sublease information was not provided regarding Consolidated Stores and Franchise Associates; percentage rent, battery sales and truck leasing payment information regarding the Penske sublease was not provided; and finally that anticipated income and expense information was not provided.

The Minnesota Supreme Court in BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) stated, "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access . . . ." Here, Respondent argues that Petitioner has not supplied all information; Petitioner argues that it has.

Petitioner asserts that the information it provided within 60 days is sufficient to comply with the requirements of the 60 Day Rule. Petitioner provided information regarding the terms of its lease with the landlord, current and anticipated income, and a net profit report on Kmart's store operations. The lease called for an additional percentage rent to be paid if the tenant (Petitioner) reached certain sales targets. This sales information was provided to Respondent.[1] Next, Petitioner argues that because it was a tenant, it did not have, and was not required to provide, information regarding the real estate income and expenses which it did not keep in the ordinary course of its business and as such, this information was unavailable. Finally, Petitioner argues that sublease information is not required to be produced under the 60 Day Rule.

Percentage Rent Clause

We first turn to the percentage rent clause. First, while the Motion asserts that Petitioner failed to turn over lease and sales information regarding the triggering of the percentage rent clause, the information supplied by Petitioner in response to the Motion shows that it did in fact provide this information for the remaining Petition. Thus, Petitioner did not run afoul of the holdings of Kmart Corp. v. County of

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[1] Information was not provided for 2000, which Petitioner acknowledged in dismissing its 2000 petition.

Becker, 639 N.W.2d 856 (Minn. 2002), Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002), and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002) ("Kmart Trilogy") requiring specific information about the triggering of a percentage rent clause. Petitioner supplied its sales figures and lease information to Respondent for purposes of calculating the percentage rent payments due under the lease in 2001. Further, Petitioner provided a copy of its net profit report for the Subject Property for the 2001 year at issue. Thus, Petitioner provided the information required under the Kmart Trilogy.

Income and Expense Information

Next, we analyze the sufficiency of the income and expense information provided. As a tenant, Petitioner maintains a record only of its business operations; it does not maintain records of the operation of the real estate and thus, asserts that that information is unavailable. While Respondent maintains that Petitioner should have the information, it does not show that Petitioner has the information. Under the 60 Day Rule, if information is unavailable, it need not be produced. Further, for the business income and expenses, as we stated in Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001), "because, under normal situations the tenant business data, including expenses relating to the real estate that are paid by the tenant, is not useful in appraising the market value of the property, it is not required to be provided under the 60 Day Rule." Id.; Kmart v. County of Ottertail, File No. C9-00-551 (Minn. Tax Ct. Order dated Nov. 18, 2000). Further, where income and expense information relating to ownership or operation of the real estate were not available to Petitioner as tenant, we have held that they do not need to be produced for purposes of the 60

Day Rule. Id. We have also held that tenant expenses, including tenant paid insurance, utilities, common area maintenance and repairs are not required under the 60-day rule. "Since other operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property." Kmart Corp. v. County of St. Louis, File No. C1-006-6700 et al. (Minn. Tax Ct. Order dated Jan. 11, 2001) citing Kmart v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001),

Here, according to the Affidavits filed by Petitioner, it did not keep real estate operating expense information or income information beyond what was produced. According to Petitioner, this information was, therefore, unavailable. If information is unavailable, it is not required to be produced under the 60 Day Rule. Respondent has failed to show that such information was available during the 60 Day Rule period; and thus, Petitioner has met its burden under the 60 Day Rule. We note that Respondent may still obtain the information through discovery, when and if it becomes available to Petitioner later.

Anticipated Income and Expenses beyond Year at Issue

Next Respondent argues that the anticipated income and expense information provided was insufficient because it did not extend beyond the year at issue. Petitioner argues that for purposes of the 60 Day Rule, only information for the year at issue must be provided. We agree. The 60 Day Rule does not state the time period for which anticipated income and expenses must be provided, but given that a Section 278 petition covers only a one year period, it would not be logical

to require data beyond this one year period for purposes of the 60 Day Rule. Because the purpose of the 60 Day Rule is to ensure that a county receives the information it needs to begin its valuation of the property in a timely fashion, we find that the anticipated income and expenses for the year at issue are required to be produced under the 60 Day Rule. Further information about income and expenses for other years may be obtained during discovery. Here, Petitioner provided the information for each of the years at issue as required.

Sublease Information

Respondent also complains that Petitioner did not provide sufficient sublease information. In Kmart Corp. v. County of Itasca, File No. CX-00-692 (Minn. Tax Ct. July 11, 2001) we held that the 60 Day Rule does not require a tenant to provide information regarding its subleases when the subleases do not impact the income to the landlord. Here, Petitioner argues that it provided substantial information regarding the subleases, even though it was not required. We agree. Respondent's assertion that it should have been supplied with more subtenant information is without merit as it has not shown that the sublease information would have any impact on the income to the landlord.

Conclusion

For the reasons stated above, we find Respondent has failed to prove that Petitioner did not comply with the 60 Day Rule. Therefore, we deny Respondent's Motion to Dismiss.

K. H. S.

STATE OF MINNESOTA TAX COURT
SEVENTH JUDICIAL DISTRICT
COUNTY OF DOUGLAS REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of Douglas,

Respondent.

ORDER GRANTING MOTION TO DISMISS

File No. C7-00-309

Dated: October 9, 2000

The Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, heard this matter on September 15, 2000 by telephone conference call.

Thomas R. Wilhelmy, Attorney at Law, represented the Petitioner.

Daniel C. Lee, Assistant Douglas County Attorney, represented the Respondent.

Both parties submitted briefs. The matter was submitted to the Court for decision on September 15, 2000.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Respondent's Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

BY THE COURT,

Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: October 9, 2000

MEMORANDUM

On or about March 30, 2000, Kmart Corporation ("Petitioner") filed a petition challenging the Assessor's January 2, 1999 valuation of the subject property located in Alexandria, Minnesota for taxes payable in 2000. Petitioner does not currently own the parcels covered by this petition. Petitioner did own the parcels until 1989, at which time Petitioner sold the subject property to another party and leased back the parcel containing the Kmart store. Under the leaseback arrangement, Petitioner is obligated to pay for a portion of the taxes on the other parcels included in the petition as well as the entire tax for its store. The parties

agree that the subject property is income producing. Within 60 days after filing its petition, Petitioner supplied information in an attempt to comply with Minn. Stat. § 278.05, subd. 6(a) ("the 60-day rule").

Douglas County ("Respondent"), in its motion to dismiss, admits that Petitioner timely provided some information but alleges that Petitioner's letter was insufficient in three respects: (1) by not providing information about the expenses of the property, (2) by not including income or expense information for the neighboring properties included in the petition and, (3) by not providing complete information which would allow for a determination of the rent paid.

The 60-day rule states:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a).

We begin our review of the sufficiency of the information provided by Petitioner under the 60-day rule by examining the issue of whether Petitioner was required to provide expense information relating to the subject property. Petitioner states, through the affidavit of Mr. Walter F. Cieslik, that no "statements or records that separately identify

the operating expenses for the real estate of the subject property" are prepared or maintained. At the hearing on this motion, Petitioner admitted that it does keep expense records for the subject property. (Tr. p. 26 & 27). Petitioner however, alleges that it does not separate, in its accounting system, those expenses attributable to the property from those attributable to its business. Petitioner therefore argues that it has no obligation to turn over to Respondent any expense information of a mixed nature, that is, information it has in its possession that reflects both business and property related expenses. Petitioner consequently did not turn over any of the expense information relating to the subject property.

Respondent argues that the language of the 60-day rule and the pertinent case law are clear in requiring the Petitioner to provide the data that is available even if that data is not the best or most helpful. Respondent points out that Petitioner made no mention of any reason that the property expenses could not be separated from the business expenses and did not allege, either in its affidavit nor at the hearing, that to separate the property expense information from the business expense information would be unduly burdensome or impossible.

The central case relating to the 60-day rule is BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). In this case, the Supreme Court stated that the statute, "clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline." " Strict enforcement of the 60-day rule is consistent with this purpose, except when the required information is simply not available to a petitioner. " Id. at 705. The question of what is "available" or "unavailable" has been addressed by the Tax Court and the Supreme Court in numerous cases. The Supreme Court has held that incomplete information or even

possibly unreliable information is required under the statute, if it is available. Id. The statute has been held to require all income and expense information, not just the income and expense information that a petitioner deems relevant. Larson Leasing Inc. v. County of Dakota, File No. C1-95-7231 (Minn. Tax Ct. Order dated Aug. 24, 1985). In other cases, the fact that audited financial statements were unavailable within the 60 day period did not constitute unavailability within the meaning of the statute when unaudited financial statements were available. Mendota Mall Assocs. v. County of Dakota, File No. CX-97-7300 (Minn. Tax Ct. Order dated Aug. 1, 1997), *aff'd,* 578 N.W.2d 350 (Minn. 1998), Doddway Investment Co. v. County of Dakota, File No. CX-97-7301 (Minn. Tax Ct. Order dated Aug. 1, 1997), *aff'd*, 578 N.W.2d 348 (Minn. 1998).

In the instant case it is not alleged that the information is truly " unavailable". In fact, Petitioner admits some expense information is available. (Tr. P. 26.) It is alleged that it does not exist in a form separate from other data that is not required under the 60-day rule. This does not make the information "unavailable" under the statute. In BFW, the Court held that "The unavailability of one type of evidence does not render unavailable other types of information within the possession of the petitioner." 566 N.W.2d at 705.

Petitioner could have prepared an expense summary containing only those expenses related to the property. Petitioner did not make the allegation in either the affidavits or at the hearing, that separating the two kinds of expenses would have been unduly burdensome or impossible.

Even if separation of the two kinds of expenses was impractical, Petitioner could have provided the information it did have, noting to the Respondent that it was of limited

value because parts of it applied to the business rather than to the property. This is analogous to the situation in BFW where the Court held, "Where there is a concern about the reliability of information required by the statute, the taxpayer should so inform the County and assert its intention to provide better information at a later date. " Id.

Petitioner did neither. Petitioner decided to provide no information on expenses though information was available or could have been made to be available.

Petitioner cites the proposition that "backup data, support memoranda and marginally relevant underlying account information" is not mandated by the 60 day rule. L. G. & E. Power Services, Inc. v. County of Lincoln, File No. C4-98-055 (Minn. Tax Ct. Order dated May 18, 1999). We stand by that ruling. Where information, sufficient to satisfy the 60-day rule has been provided, the "backup data" is not also needed for compliance with the rule. That ruling however, does not mean that a petitioner may hide behind its accounting system so as not to provide the information required under the 60 day rule. The instant case presents a different issue. The Petitioner admits that expense information exists but has not turned anything over because it claims the required information is mixed or intermingled with other data which may or may not be useful, relevant or required. The L. G. & E. decision does not relieve Petitioner of the obligation to provide the initial information needed to comply with the 60-day rule.

Petitioner also points the Court to its decision in 14041-14051 Aldrich South Premises v. County of Dakota, File No. CX-95-7373 (Minn. Tax Ct. Order dated Aug. 24, 1995). In that case, we found that expense information was "unavailable" because the information was in the control of

the landlord rather than the tenant and the landlord had not responded to the tenant's request for the information. That is distinguishable from the case before us. In this case, Petitioner, the tenant, does keep some if not all of the expense records. Petitioner has requested income and expense information from its landlord. The fact that the landlord has not yet responded to Petitioner's request for the landlord's expenses does not excuse Petitioner from producing those expense records within its possession.

The Supreme Court has laid down a very clear and simple rule: produce, within 60 days, the information within your possession. Issues of completeness, accuracy and relevancy can be dealt with through the discovery process, updates or at trial.

Following the line of reasoning in the cases cited above, we find that Petitioner is obligated under the 60-day rule to provide the expense information it has, even if that information is mixed with data which is not required under the 60-day rule. Because Petitioner failed to provide any expense information for the subject property even though it had that expense information within its possession, we find that the Petitioner did not comply with the 60-day rule. Respondent's motion to dismiss is therefore granted. In light of this ruling, we need not reach the other issues presented by Respondent.

R.R.K.

STATE OF MINNESOTA TAX COURT
SEVENTH JUDICIAL DISTRICT
COUNTY OF DOUGLAS REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of Douglas,

Respondent.

ORDER

File No. C7-00-309

Dated: January 11, 2001

The Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, heard Petitioner's Motion for Reconsideration on November 14, 2000 by telephone conference call.

Thomas R. Wilhelmy, Attorney at Law, represented the Petitioner.

Daniel C. Lee, Assistant Douglas County Attorney, represented the Respondent.

Both parties submitted briefs The matter was submitted to the Court for decision on November 22, 2000.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Petitioner's Motion for Reconsideration is granted in part and denied in part.

2. The petition in this case shall be dismissed pursuant to Minn. Stat. § 278.05, subd. 6(a).

IT IS SO ORDERED. THIS IS A FINAL ORDER.

BY THE COURT,

Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: January 11, 2001

MEMORANDUM

This Court originally heard a motion to dismiss this petition on September 15, 2000 and issued an order dismissing the petition on October 9, 2000. After the original hearing, Petitioner revised its argument and clarified various statements counsel made on the record. Given this clarification, we granted leave to file a motion for reconsideration.

The issue in this case concerns Minn. Stat. § 278. 05, subd. 6(a) (the "60 Day Rule"). The 60 Day Rule provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.
>
> Minn. Stat. § 278. 05, subd. 6(a).

Expense Information

At the original motion hearing on September 15, 2000 Respondent sought to dismiss the petition for failure to comply with the 60 Day Rule. Respondent alleged that Petitioner did not provide certain expense information, related to the subject property, within the 60 day period. Petitioner stated in response,

> "Counsel, at some level is correct. We do have some expenses that may be related to what are typically real estate expenses. For example, we have expenses for heating the property. And we have expenses for lighting the property. On Kmart's records, those expenses are blurred. The expenses of lighting the property, the electricity that's consumed, that is shown in the one statement that includes the expense of running the cash register and running of the

> equipment that is necessary to operate a store. We do not have a break out between the base level of electricity to operate a retail facility, as opposed to the specifics of operating a store with the cash registers and the other equipment that's involved."
>
> Tr., pp.26-27.

Based largely on that statement, this Court granted Respondent's motion to dismiss.

The Supreme Court interpreted the 60 Day Rule in BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) stating "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access, even if that information might not allow the County assessor to reach a final conclusion regarding the property's value." Id. at 705. Given this well established principle and Petitioner's admission that it had expense data relating to the real estate but withheld it because it was "blurred" with other expenses and could not be "broken out," we dismissed the petition. We held that there is no exception in the 60 Day Rule for a situation where financial information that is required under the 60 Day Rule is inextricably intermixed with data that is not required. The petitioner is obligated to provide the county with the information it has, however mixed. We stand by that ruling.

At the hearing on the motion to reconsider, Petitioner revised its argument and clarified its prior statement. Petitioner now argues that since only those expenses that relate to the real estate and are paid by the landlord are used in an appraisal to determine the value of the property, expenses paid by the tenant do not fall within the

requirements of the 60 Day Rule. In other words, the purpose of the 60 Day Rule is to ensure that a county receives the information it needs to begin its valuation of the property in a timely fashion. The value of the property, as determined under the income approach, requires capitalizing the value of the income stream from the property after the expenses that reduce the income stream are deducted. Since expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. Petitioner clarifies that it only had information on expenses it paid as tenant and none on expenses paid by the landlord. It argues therefore, that those expenses, even if related to the real estate are not required under the 60 Day Rule.

Respondent argues that the statute and BFW do not differentiate between expenses paid by a tenant and expenses paid by the landlord. Respondent concludes therefore that any and all information having to do with the operation or maintenance of the property should be provided under the 60 Day Rule.

Petitioner relies on three cases in making its argument. We do not find them persuasive. We reject Petitioner's reliance on 14041-14051 Aldrich S. Premises v. County of Dakota, File No. CX-95-7373 (Minn. Tax Ct. Order dated Aug. 24, 1995). That case was decided shortly after adoption of the current language of the 60 Day Rule by the legislature and before the case law on this issue was developed by the Supreme Court in BFW. The holding in Aldrich is properly limited to the facts in that case. We also distinguish Kmart Corp. v. County of Ottertail, File No. C9-00-551 (Minn. Tx. Ct. Order dated Nov. 16, 2000)(income and expenses of tenant business operations sought) and Minnesota Timberwolves Ltd. P'ship v. County of Hennepin,

File Nos. TC-26329, TC-26856 (Minn. Tax Ct. Order dated Apr. 20, 1999) (information on arena ticket sales sought). The income or expense information sought in these cases was not characterized as directly related to the real estate itself. In the instant case, the expense information sought has to do directly with the real estate and arguably falls more closely under the 60 Day Rule and the BFW ambit.

The language of the statute simply states, "information, including income and expense figures." Nevertheless we are, in effect, being asked by Petitioner to establish a relevancy test in determining what information is required to be provided under the 60 Day Rule. The Supreme Court's decision in BFW does not give us guidance on this point. The Supreme Court, in BFW was not asked to decide between relevant and irrelevant information. All the information sought in BFW was relevant to valuation. Although the Supreme Court's language in BFW does not make a clear distinction between relevant information and information that is not relevant to establishing value, we find the distinction is implied.

The penalty for noncompliance with the 60 Day Rule is dismissal. This harsh result requires us to examine closely the purpose of the 60 Day Rule. The Supreme Court stated in BFW, "the legislature's purpose in passing chapter 278 was to provide 'an adequate, speedy and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the ...court'...."[1] The purpose of the 60 Day Rule is to ensure that a county receives, in a

[1] quoting Continental Sales and Equip. Co. v Town of Stuntz, 257 N.W.2d 546, 548 (Minn. 1977) (quoting Land O' Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 548 31 N.W.2d 660 665 (1948)).

timely fashion, the information necessary to begin its appraisal of value of the subject property. A requirement that a tenant business, such as the Kmart in this case, provide all of its business expenses whether relevant to determining the property's value or not, would impede rather than facilitate a "speedy and simple remedy."

We cannot believe that the legislature and the Supreme Court would command such a draconian penalty because a petitioner failed to provide, within 60 days, information, which is irrelevant to the valuation of the property. The strict reading of the language of BFW, urged on us by Respondent, would potentially require that volumes of business records be turned over in every case within 60 days for no apparent purpose. This is an absurd interpretation, which is counter to the intent and purpose of the legislature. Our holding in this case is consistent with and supported by our holdings as they have developed since BFW.

Respondent argues that in some very limited cases, the broader tenant business data may be relevant. If, in those limited situations, it is meaningful information that is critical to enable the county to begin its valuation work, it must be provided within 60 days. Otherwise, it makes sense to request the specific data through the discovery process. We are not holding that tenant business data is never relevant nor that it is not subject to normal discovery. We hold only that because, under normal situations the tenant business data, including expenses relating to the real estate that are paid by the tenant, is not useful in appraising the market value of the property, it is not required to be provided under the 60 Day Rule.

Petitioner has clarified that the information it had and did not provide during the 60 day period is tenant paid business expenses related to real estate mixed with non-real estate expenses. To this limited extent, we find that the order of October 9, 2000 should be modified to include the discussion above and the petition should not be dismissed on the grounds stated therein.

Income Information

Because we dismissed the petition on other grounds in our October 9, 2000 decision we did not decide the second issue raised by Respondent at that time. We do so now.

In response to the 60 day requirement, Petitioner provided to Respondent, in a timely fashion, a copy of its lease with the landlord. This was in an effort to comply with the statute's income information provision requirements. Normally, a simple lease states the amount of rent to be paid by the tenant to the landlord. The rent amount represents the income information required under the 60 Day Rule. Provision of the lease therefore, in many cases, is sufficient to satisfy the income information requirement.

In this case, the lease contains a base rent and notes that if Petitioner's gross sales exceed a certain amount, an escalator clause is triggered which calls for increased rent. Petitioner provided the lease but did not provide any information as to whether or not the escalator clause was triggered. Petitioner admits it had that information during the 60 day period but did not disclose it to the County. The missing information is that the gross sales did not reach the trigger level and that the escalator clause was not triggered.

Respondent argues that the lease itself is of no use in beginning an appraisal without enough information to determine the total rent paid. Respondent argues that Petitioner had additional information in its possession, which could, together with the lease, have been enough to comply, but chose not to provide it.

Petitioner makes essentially two arguments. First, that it is not required under the 60 Day Rule consistent with the Timberwolves decision, to provide gross revenue. That is correct as far as it goes. Petitioner, however is not being forced to turn over its gross revenue figures. All it had to do is provide a copy of the lease, accompanied by a statement that the escalator clause had not been triggered. In the alternative, the Petitioner could have simply stated the total amount of rent paid. Either option would have enabled Respondent to interpret the lease.

Second, Petitioner argues that since the escalator clause was not triggered, the base rent contained in the lease was the actual rent. Petitioner argues that therefore it had provided the correct and complete income data but the County just did not know it. Petitioner goes on to claim that its case should not be dismissed because of the inability of the County to make what amounts to a theoretical calculation that does not affect the outcome.

This argument is specious in the extreme. The problem facing Respondent is to have enough information to begin its appraisal of the subject property. The purpose of the 60 Day Rule is to give that information to Respondent. The 60 Day Rule requires a meaningful provision of information. Kmart Corp. v. County of St. Louis, File No. C1-006—6700, C3-00-600671, C8-00-600665, CX-00-600666 (Minn. Tax Ct. Order dated Jan. 11, 2001). Without that, the Legislature's

purpose in enacting the rule is completely defeated. If Respondent does not know what the income is, it cannot realistically begin its work. In this case, Petitioner admitted that there is no way Respondent could have known base rent was actual rent. [2]

The fact that the escalator clause was not triggered does not mean that that fact is irrelevant. The fact that the additional rent was zero is as important a fact to know as if the additional rent were $100,000. It is relevant information and must be provided. Without it the lease is not useful and no income data can be deemed to have been provided. We have consistently held since BFW, that if a petitioner has relevant information in its possession it is required by the 60 Day Rule to provide it.

We therefore affirm our previous order dismissing the case for failure to comply with the 60 Day Rule. We do so however, on the grounds pertaining to the Respondent's second argument regarding the failure of Petitioner to provide complete and relevant income information.

R.R.K.

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[2] Question by the Court: " In order for an appraiser, under USPAP, to make any beginning at a decision as to the value of this property, they need to have-and this is the reason for the 60 day statute- they need to have the actual rent paid, wouldn't they?"
Petitioner's Counsel: "Yes they would. And by giving them the base rent, we did give them the actual rent paid."
Court: "But they didn't know that, because you didn't give them the rest of the information."
Counsel: "Right. Yes, Your Honor. We knew that, when we turned over what we did. They didn't know that." Tr.,p.35.

STATE OF MINNESOTA TAX COURT
SEVENTH JUDICIAL DISTRICT
COUNTY OF OTTER TAIL REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of Otter Tail,

Respondent.

ORDER DENYING MOTION TO DISMISS

File No. C9-00-551

Dated: November 16, 2000

The Honorable Diane L. Kroupa, Chief Judge of the Minnesota Tax Court, heard Respondent's Motion to Dismiss by telephone conference call on November 2, 2000.

Thomas R. Wilhelmy, Attorney at Law, with the Fredrikson and Byron Law Firm, represented Petitioner.

Jennifer L. Lessinger, Assistant Otter Tail County Attorney, represented Respondent.

The Court, having heard and considered the evidence and the arguments of counsel, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. We deny Respondent's Motion to Dismiss under Minn. Stat. § 278.05, subd. 6 regarding income and expense data.

2. Trial of this matter to determine the January 2, 1999 value of the subject property is scheduled for February 12, 2001 at 10 a.m. in Otter Tail County.

IT IS SO ORDERED.

BY THE COURT,

Diane L. Kroupa, Chief Judge
MINNESOTA TAX COURT

DATED: November 16, 2000

MEMORANDUM

Petitioner filed a Minn. Stat. ch. 278 petition on March 28, 2000 contesting the January 2, 1999 assessed value of real estate in Fergus Falls, Minnesota improved with a Kmart store (the "Store"). Petitioner agrees that the property is income-producing property and that Petitioner was required to provide all available income and expense

figures, verified net rentable areas, and anticipated income and expenses to the county assessor within 60 days of filing the petition. Minn. Stat. § 278.05, subd. 6(a) (the "60-Day Rule").

Within the 60-day period, Petitioner provided the County with information regarding the property that Petitioner leases from an unrelated third party consisting of 55,552 square feet (the "Leased Premises"). Petitioner provided the County with information summarizing a June 20, 1978 Lease between Petitioner as tenant and Atlantic Investment Company as landlord (the "Lease"). The Lease information specified that the Lease was for 25 years subject to ten 5-year renewal periods. The Lease information also specified that Petitioner was required to pay all real estate taxes, special assessments, insurance, parking lot maintenance expenses, exterior and interior repair costs, utilities and other charges under the Lease. Petitioner was required to pay annual rent to the Landlord in the amount of $154,100 ($2.77 per sq. ft.) per annum net, which is the equivalent of $3.60 per sq. ft. gross regarding the 55,552 square feet subject to the Lease. The information specifically provided that no percentage rent was due under the Lease. The Lease also allowed Petitioner as tenant to construct additional buildings and to make alterations, additions or changes. In the cover letter transmitting the Lease information, Petitioner's counsel stated that there might have been an expansion of the original store because, to the best of their knowledge, the Store is currently 83,552 square feet.

On August 1, 2000, after the 60-day deadline, the County Attorney requested additional information from Petitioner. Specifically, the County requested additional information regarding the current building area of the Store because the building area under the Lease was substantially

different than the 83,552 square feet specified for the Store. The County also requested current income and expense figures and anticipated income and expenses. The County stated that it wanted this "supplemental information" by August 25, 2000 and if Petitioner failed to provide it by that date, the County would move for dismissal under the 60-Day Rule.

The 60-Day Rule provides:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed. . . . Failure to provide the information required . . . shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. §278.05, subd. 6(a).

In moving for dismissal, the County acknowledges that Petitioner provided financial information but alleges that the information is incomplete and inaccurate. During argument, the County asserts that, instead of inaccurate information, Petitioner failed to provide any income and expense information because Petitioner failed to provide any income and expense information from operation of the Store.

Petitioner counters that it provided to the County, within the 60-day period, all income and expense information in its possession regarding the Leased Premises. Although there is a discrepancy between the square footage Petitioner

rents from the Landlord and the 83,552 square foot Store, the difference is attributable to real estate Petitioner acquired after the Lease was executed upon which Petitioner built an addition ("Addition") as authorized under the Lease (the "Additional Land"). Petitioner owns the Additional Land upon which the Addition was built, and, therefore, Petitioner is the owner-occupier of that portion of the Store and is not required to provide any information under the 60-Day Rule. We agree.

We have frequently and consistently ruled that owner-occupied property is not income-producing property subject to the 60-Day Rule. Cypress Semiconductor v. County of Hennepin, File Nos. TC-27376 and TC-27033 (Minn. Tax Ct. Order dated Dec. 16, 1999) (relying upon Hubbard Milling Co. v. County of Blue Earth, File Nos. C4-93-641 and C6-93-642 (Minn. Tax Ct. Order dated Feb. 1, 1994) and Lyman Lumber Co. v. County of Hennepin, File Nos. TC-11620, TC-14736 and TC-17237 (Minn. Tax Ct. Order dated Feb. 5, 1993), both decided under Minn. Stat. § 278.05, subd. 6(b)); Menards, Inc. v. County of Sherburne, File No. C2-98-460 (Minn. Tax Ct. Order dated Aug. 20, 1998).

Moreover, we agree with Petitioner that the 60-Day Rule does not require dismissal if some information Petitioner supplies is inaccurate. In fact, the Minnesota Supreme Court has emphasized the petitioner's obligation to produce its available information, even if the information may be inaccurate. BFW Co. v. County of Ramsey, 566 N.W.2d 702, 705 (Minn. 1997). "We hold that the statute's text requires the petitioner to provide all information within its possession, even though the petitioner deems certain portions of that information to be incomplete or not fully accurate." 566 N.W.2d at 705.

We next address the County's secondary position that instead of being incomplete or inaccurate information, Petitioner failed to provide any income and expense information because Petitioner failed to provide any income and expense information of the Store.

We reject the County's argument that Petitioner must provide income and expense information of operating the Store under the 60-Day Rule. Income and expenses of operating the Store is not relevant to value the property. See Minnesota Timberwolves Ltd. P'ship v. County of Hennepin, File Nos. TC-26329 and TC-26856 (Minn. Tax Ct. Order dated Apr. 20, 1999)(subpoenaed income and expense information of business not relevant to the value of the property); Menards, supra (sales and income information of retail business not subject to 60-Day Rule production).

We refuse to interpret the 60-Day Rule to require income and expense information of the business be produced. Here, the Lease specifically provided that no percentage rent was due under the Lease. Thus, the Store's sales and income information does not affect rent payable under the Lease. We find the relevant income and expense information required to be produced under the 60-Day Rule is income and expense information regarding the ownership and operation of the real estate, not the business operated in or on the real estate.

The income and expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves, all relevant considerations under the income capitalization approach to value. All of these expenses are available to the Landlord, not the tenant. None of these expenses are available to Petitioner as tenant. Accordingly, we find that income and expense statements relating to ownership or operation of the real estate were not

available to Petitioner as tenant. We previously found in a limited set of facts that income and expense data of an operating leasehold estate that a tenant requested from the landlord was "unavailable" to the tenant for purposes of the 60-Day Rule. 14041-14051 Aldrich South Premises v. County of Dakota, File No. CX-95-7373 (Minn. Tax Ct. Order dated Aug. 24, 1995).

We are convinced that Petitioner provided all income and expense information Petitioner had in its possession within the 60-day period regarding the Lease. We accordingly deny the County's motion to dismiss and schedule the trial to determine the subject's January 2, 1999 fair market value.

D.L.K.

STATE OF MINNESOTA

COUNTY OF ST. LOUIS

TAX COURT
SIXTH JUDICIAL DISTRICT
REGULAR DIVISION

Kmart Corporation,

Petitioner,

vs.

County of St. Louis,

Respondent.

ORDER

File Nos. C1-00-600670
C3-00-600671
C8-00-600665
CX-00-600666

Dated: January 11, 2001

The Honorable George W. Perez, Judge of the Minnesota Tax Court, heard this matter on November 6, 2000 by telephone conference call.

Laurie J. Miller, Attorney at Law, represented Petitioner.

Barbara A. Russ, Assistant St. Louis County Attorney, represented Respondent.

Both parties submitted post trial briefs. The matter was submitted to the Court for decision on November 22, 2000.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Respondent's Motion to Dismiss is hereby granted in part and denied in part.

2. The petitions for File Nos. C1-00-600670, C3-00-600671, and C8-00-600665 shall be dismissed pursuant to Minn. Stat. § 278.05, subd. 6(a).

3. The Tax Court Administrator shall reschedule the matter in File No. CX-00-600666 for trial.

IT IS SO ORDERED.

BY THE COURT,

George W. Perez, Chief Judge
MINNESOTA TAX COURT

DATED: January 11, 2001

MEMORANDUM

The issue in this matter involves the application of Minn. Stat. § 278.05, subd. 6(a) ("the 60 Day Rule"). The 60 Day Rule provides,

> Information, including income and expense figures, verified net rentable areas, and

> anticipated income and expenses, for income producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at the time.
>
> Minn. Stat. § 278.05, subd. 6(a).

This case involves four Kmart stores located in St. Louis County, Minnesota. Two of the properties are located in Duluth, Minnesota and are referred to as, Mall Drive and West Duluth. The other two properties are located in the cities of Virginia and Hibbing, Minnesota and are referred to as the Virginia store and the Hibbing store. Petitioner filed petitions for all four properties on March 31, 2000. The County does not dispute that Petitioner provided information within the 60 day period.

The issue is whether the information provided complies with the 60 Day Rule. Petitioner provided the County with lease summaries for the four Kmart properties. The lease summaries for each Kmart property, except the Hibbing store, contain a base rent and note that if Petitioner's gross sales exceed a certain amount, an escalator clause is triggered which calls for increased rent. The Hibbing store lease is a flat rental lease and since it does not involve an escalator clause trigger, the flat rent is the total rent paid. Respondent does not dispute that the Hibbing store information provided complies with the 60 Day Rule.

The Minnesota Supreme Court first interpreted the 60 Day Rule in BFW Company v. County of Ramsey, 566

N.W.2d 702 (Minn. 1997). The Supreme Court stated that, "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access, even if that information might not allow the County assessor to reach a final conclusion regarding the property's value". Id. at 705. The Supreme Court further stated that, "the legislature's purpose in passing chapter 278 was to provide 'an adequate, speedy and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the...court...'"[1] In order to ensure an "adequate, speedy and simple remedy" for the taxpayer, the petitioner must provide meaningful information to the county so that it can begin its appraisal of value of the subject property.

Income Information

In this case, the relevant information for three of the four Kmart properties is whether or not the escalator clause was triggered in order to determine total rent paid. All Petitioner had to do was provide a statement, accompanied by the lease summary information, that the escalator clause had not been triggered. Without this statement, the information provided to the County was meaningless; it could not begin its appraisal of the Kmart properties other than the Hibbing store.

Respondent argues that the lease itself is of no use in beginning an appraisal without enough information to determine the total rent paid. Petitioner argues that the 60

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[1] quoting Continental Sales and Equip. Co. v Town of Stuntz, 257 N.W.2d 546, 548 (Minn. 1977) (quoting Land O' Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 548 31 N.W.2d 660 665 (1948)).

Day Rule and interpretive case law does not require Petitioner to provide gross sales figures or information about whether an escalator clause is triggered. Furthermore, Petitioner urges us to find that so long as something or anything is provided to the county, there is compliance with the 60 Day Rule.

Petitioner relies primarily on 14041-14051 Aldrich South Premises v. County of Dakota, File No. CX-95-7373 (Minn.Tax Ct. Order dated Aug. 24, 1995) in its interpretation of the 60 Day Rule. We reject Petitioner's primary reliance on Aldrich. That case involved information not currently available to the petitioner. Availability is not an issue in this case. The information as to whether the escalator clause was triggered was available to Petitioner in this case. Furthermore, Aldrich was decided shortly after the legislature adopted the current language of the 60 Day Rule and before the Minnesota Supreme Court provided an interpretation and guidance in the application of the 60 Day Rule in BFW. Any analysis of the 60 Day Rule would be incomplete without considering and applying the principles established in BFW.

We are not persuaded by Petitioner's urging that so long as something or anything is provided to the county, there is compliance with the 60 Day Rule. To simply allow Petitioner to provide any or some information without regard to relevance would run counter to the plain reading of the 60 Day Rule and BFW. Kmart Corp. v. County of Douglas, File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001). Petitioner is simply required to provide all available relevant and meaningful information that will allow the County to begin its appraisal of value of the subject property. The income information provided by Petitioner in this case does not allow the County to begin its appraisal of value of the Kmart properties other than the Hibbing store, and therefore,

does not comply with the 60 Day Rule. The escalator clause trigger information was available. Therefore, we find that Petitioner was not in compliance with the 60 Day Rule in providing income information as to Mall Drive, West Duluth and the Virginia store. We find Petitioner complied with the 60 Day Rule in providing income information as to the Hibbing store.

Expense Information

Similar to the escalator clause trigger regarding the income (or rent payable), there is a rent adjustment if real estate taxes exceed a certain amount. Again, for Petitioner to comply with the 60 Day Rule Petitioner was required to provide the County with a statement indicating whether the real estate taxes exceeded the threshold amount and the real estate tax payments made by Petitioner. In turn, the County could then adjust the rent payable and calculate an income amount. Without providing this expense information, available to Petitioner, the County cannot meaningfully begin its appraisal of value for the Kmart properties. This rent adjustment clause is in three of the Kmart property leases. This clause is not found in the lease information as submitted to the court for the Hibbing store. Therefore, we find the expense information provided by Petitioner to the County regarding the Hibbing store complies with the 60 Day Rule. We find that Petitioner was not in compliance with the 60 Day Rule in providing expense information as to Mall Drive, West Duluth and the Virginia store.

Since other operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. Kmart Corp. v. County of Douglas,

File No. C7-00-309 (Minn. Tax Ct. Order dated Jan. 11, 2001). Therefore, these other operating expenses do not need to be provided in this case.

We grant the Respondent's Motion to Dismiss, as to Mall Drive, West Duluth and the Virginia store. We deny Respondent's Motion to Dismiss as to the Hibbing store.

G.W.P.

STATE OF MINNESOTA

COUNTY OF LINCOLN

TAX COURT
FIFTH JUDICIAL DISTRICT
REGULAR DIVISION

LG&E Power Services, Inc.,

Petitioner,

vs.

County of Lincoln,

Respondent.

ORDER

File No. C4-98-055

Dated: May 18, 1999

This matter was heard by the Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, on April 14, 1999, at the Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota.

Thomas R. Wilhelmy, Attorney at Law, represented the Petitioner.

Larry D. Martin and Sharna A. Wahlgren, Attorneys at Law, represented the Respondent.

The Court, having heard and considered the arguments of counsel, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Respondent's motion to dismiss is denied.

2. Respondent's motion to compel Petitioner to respond to interrogatories and produce documents is granted.

3. Petitioner shall respond to, or supplement its answers to Interrogatories 1, 11 and 15 within 30 days of the date of this Order.

4. Petitioner shall respond fully to Interrogatories 3, 4, 12, and 16, as the information becomes available.

5. Petitioner shall either produce the relevant business records in the manner prescribed by Minn. R. Civ. P 33.03 or answer Interrogatories 5-8, 10, and 13 in full within 30 days of the date of this Order.

6. Petitioner's objection with regard to Interrogatory 17 is sustained.

7. Petitioner's motion for a protective order is granted.

8. Petitioner has produced or is producing to Respondent certain "confidential financial information" which is designated as private or non-public data under Minn. Stat. § 13.51, subd. 2 of the Minnesota Data Practices Act, Minn. Stat. Chapter 13 ("Data Practices Act"). All documents and information furnished by Petitioner to Respondent with respect to the subject property which are described in Minn. Stat. §§ 13.51 or 278.05, subd. 6(a) shall be given the protection granted to "non-public data" by Minn. Stat. ch. 13. In recognition of the fact that "assessor's data," as described in Minn. Stat. § 13.51, subd. 2, is classified private or non-public only for the "current year" (in the case of Minn. Stat. § 13.51, subd. 2(a) and (d) and (e)) and only for the "previous three years" to the current year (in the case of Minn. Stat. § 13.51, subd. 2(a) and (b)), it is ordered that

during the pendency of this action (including any and all appeals) all data furnished to Respondent by Petitioner under this paragraph 8 will be treated as private or non-public and given the protection of the Data Practices Act. Respondent shall have the right to utilize the data provided by Petitioner under this paragraph 8 in the assessment and the review assessment of the subject property and other properties pursuant to Minn. Stat. § 273.061, subd. 8(a). Data provided by Petitioner to Respondent under this paragraph 8 will not be provided to any person other than to the Commissioner of Revenue or to another Minnesota assessor. Respondent will provide the Commissioner or any Minnesota assessor who receives said data, whether in summary form or otherwise, with a copy of this Order and any such person shall be bound by this Order. Respondent will also provide the Commissioner, and any Minnesota assessor who receives said data, copies of any amendments to this Order. Respondent will use his best efforts to avoid the release or publication of any data provided by Petitioner under this paragraph in any other unrelated proceedings unless Respondent provides thirty (30) days prior written notice to Petitioner's counsel in these proceedings.

9. Petitioner has produced or is producing to Respondent certain other documents and information containing "confidential financial information" which is not described in Minn. Stat. §§ 13.51 or 278.05, subd. 6(a). Said documents and information may be used by Respondent only in these proceedings and may be given only to the expert(s) appointed by Respondent to prepare its appraisal report and its case in these proceedings. At the conclusion of this litigation, all documents and information described in this paragraph 9 shall be returned by Respondent or its expert(s) to Petitioner. Respondent shall only keep such documents as necessary to comply with professional requirements under the

Uniform Standards of Professional Appraisal Practice (USPAP) related to Respondent's appraisal analysis in this case. Any copies thus kept shall not be disclosed, copied, or disseminated to any person or entity or used for any purpose except for complying with USPAP requirements related to Respondent's appraisal analysis in this case.

10. Petitioner shall clearly mark those documents, which are considered private or non-public data under Minn. Stat. § 13.51, and those that are not.

11. Respondent's request for attorney's fees is denied.

IT IS SO ORDERED.

BY THE COURT,

_____

Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: May 18, 1999

MEMORANDUM

INTRODUCTION

This is a property valuation case in which Petitioner, LG & E, operates wind driven electrical power generators on the subject property. Respondent, Lincoln County, has moved to dismiss under Minn. Stat. § 278.05, subd. 6(a) for failure to provide sufficient data within 60 days. Respondent has also moved to compel discovery of various data.

Petitioner has moved for a protective order to cover the data subject to the motion to compel and other data. In addition, Respondent seeks recovery of attorney's fees under Minn. R. Civ. P. 37.01(d). We will deal with each motion in turn.

MOTION TO DISMISS

The requirements of Minn. Stat. § 278.05, subd. 6(a) are:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

Minn. Stat. § 278.05, subd. 6(a) (the "60-Day Rule"). Petitioner did submit a reasonable proxy for net rentable areas. Respondent argues however, that a one-page income and expense sheet provided by Petitioner in response to the 60-Day Rule is, by itself, insufficient to effect compliance.

Petitioner makes three points in its defense. First, it is argued that the subject property is not income producing property and therefore not subject to requirements of the 60-Day Rule. Second, Petitioner argues that there was voluntary compliance with the financial data requirement by providing the one page income and expense sheet. That sheet, Petitioner argues, is by itself sufficient to comply with the demands of the statute. Third, Petitioner argues that the

income and expense sheet plus the data previously provided to Respondent by Mr. Charles J. Oeler, a representative of Petitioner, is more than sufficient to comply with the 60-Day Rule.

We will begin our analysis with the third proposition put forward by Petitioner. Petitioner has provided, as stated above, a one-page income and expense statement. While skeletal at best, it does provide income and expense figures. Respondent argues that without more, this is insufficient for an appraiser to form a judgment using the income approach to valuation. In response, Petitioner points to information turned over to Respondent prior to the start of the 60-day clock by Mr. Oeler (the "Oeler Data"). The Oeler Data arguably amplifies and explains some of the data on the income and expense sheet.

Neither the 60-Day Rule nor the case law detail what specific information nor how much information is needed in order to comply with the 60-Day Rule. Respondent relies upon BFW Co. v. County of Ramsey, File No. C9-96-3330 (Minn. Tax Ct. Order dated Nov. 19, 1996) aff'd 566 N.W.2d 702 (Minn. 1997) and Metro Truck Plaza, Inc. v. County of Dakota, File No. C9-97-6302 (Minn. Tax Ct. Order dated May 20, 1997), for the proposition that all information within Petitioner's possession must be turned over within 60 days. We disagree with that interpretation of the cases and distinguish them from this case. In BFW the petitioner turned over no data within 60 days because it felt the data it had might be inaccurate. The Supreme Court said that a petitioner must turn over all the relevant data even if inaccurate, rather than withhold it until verified. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). That is a very different situation than in this case.

We agree that the Supreme Court in BFW held that "all [income and expense] information to which petitioner has access" must be provided. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). The court did not, however, hold that all the backup data support memorandum and marginally relevant underlying accounting information is also required. To make such a ruling would impose a huge and unworkable burden on the taxpayer. Such a ruling would also put taxpayers at risk of dismissal while never knowing "how much is enough."

The 60-Day Rule, as it has evolved, gives some certainty to both parties. Income and expense data must be provided if available. The information provided should be sufficient to allow an expert to begin (if not complete) reaching a decision regarding value. Additional material may be useful and discoverable but it is not mandated within the 60-Day Rule.

In Metro Truck Plaza, the data provided was less complete than the one page income and expense sheet supplied by Petitioner here. In addition, Petitioner here has supplemented the one page summary with the Oeler Data.

The Court has in the past evaluated each case individually. We have examined the material provided to Respondent in this case and find that Petitioner did supply the income and expense information in summary form and supplied the Oeler Data, which together are sufficient to comply with the 60-Day Rule. We do not make any findings as to whether the income and expense sheet alone would be sufficient nor whether the property is income producing and thus subject to the 60-Day Rule at all.

MOTION TO COMPEL

Given this Court's ruling below regarding the protective order, we agree that Petitioner is obligated to make complete and non-evasive answers to the relevant interrogatories and to turn over the business documents promised for the other interrogatories. The exception to this is with regard to Interrogatory 17, which calls for information regarding persons Petitioner "consulted with as a possible expert for trial." This Court has held that, "experts retained or specially employed in anticipation of litigation but not expected to be called at trial are not discoverable absent a showing of exceptional circumstances." Equitable Life Assurance Soc'y v. County of Hennepin, File Nos. 13351, 16286, 18917 (Minn. Tax Ct. Order dated Aug. 30, 1994) slip op. at 4, citing Ager v. Stormant Hospital And Training School, 622 F.2d 496 (10th Cir. 1980). "After carefully reviewing the cases and arguments presented by both parties, we conclude that Minn. R. Civ. P. 26.02, sections (c) and (d)(2) protect the names and opinions of any experts consulted by Petitioner in considering a challenge to the valuation of the subject property absent a showing of exceptional circumstances." Id. at slip op. 7. We find no showing of exceptional circumstances in this case.

MOTION FOR PROTECTIVE ORDER

This is a case of first impression regarding a protective order for sensitive, commercial, technology data. Much of the data sought by Respondent relates to the technology of wind generated power. It encompasses design, repair, maintenance, cost of operation, modification and performance data as well as other sensitive intellectual property material.

This Court has dealt extensively with the issue of commercial retail sales and lease-data and has built up substantial case law regarding the protection of such data. With the unique exception of Mall of America Co. v. County of Hennepin, File Nos. TC-16076, TC-16772, TC-18309, TC-21195, TC-22440 (Minn. Tax Ct. Order dated Aug. 2, 1995) modifying Minn. Tax Ct. Order dated Mar. 20, 1995, this Court has issued relatively limited protective orders. We are asked in this case to order much more expansive protection, similar to that ordered in the Mall of America case.

Petitioner argues that this case fits the rule laid down in Mall of America. That is, that the property is unique and that the data was highly protected by the petitioner. We do not find these arguments persuasive.

In this case, the unique nature of the property is not very relevant. It is the nature of the data that is important. The data contains unique, experiential, maintenance, performance, repair, redesign and structural modification information, which is, in and of itself, valuable commercial intellectual property. Disclosure of this data would not materially affect the subject property value but would eliminate the commercial value of the data itself. Whether Petitioner intends to sell the data for revenue or keep it confidential for competitive advantage reasons, is not our concern. Petitioner has a right however, to protect its intellectual property assets. A court may order, "for good cause shown that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Minn. R. Civ. P. 26.03(g). Respondent conversely, has the right to use the data to assess the value of the subject property. It is appropriate therefore to craft a protective order which provides Respondent with the data but does not require

Petitioner to lose its valuable intellectual property assets as a condition of challenging a property valuation. The question is not whether, but how much protection is necessary to safeguard the data.

The protective order in this case goes beyond a "normal" protective order issued by this Court. It does so in order to protect commercially valuable technological data. It is not this Court's intent to change or relax the tests in Mall of America. This is a unique case in which sensitive technology is at risk. We distinguish it from the usual cases where protection is sought for sales or leasing information. That data is also important and deserving of protection but is adequately protected by this Court's more limited protective orders. We caution counsel however, that this information may become public if introduced at trial.

ATTORNEY'S FEES

Respondent seeks attorney's fees based upon Petitioner's failure to comply with its discovery requests within the time agreed upon. Petitioner admits that it has not yet fully complied with discovery requests.

Petitioner commenced this real estate tax appeal action on or about March 27, 1998. On May 12, 1998 Respondent served Petitioner with a request for production of documents and interrogatories. Counsel for both parties agreed to an extension of the deadline by which Petitioner was required to submit its discovery responses. On or about November 16, 1998, Petitioner served its answers and responses upon Respondent. With its discovery responses, Petitioner enclosed a proposed stipulation and protective order. Respondent objected to this proposed stipulation and order. On December 2, 1998, the parties' counsel met to

review Petitioner's documents responsive to Respondent's discovery requests. On January 21, 1999 Respondent forwarded its own proposed stipulation and protective order to Petitioner. On March 4, 1999 Respondent advised Petitioner that it required full and complete answers to its interrogatories, and demanded an opportunity to review and copy the business records that Petitioner had previously indicated would be forthcoming.

Petitioner argues that the noncompliance was due to the extended and ultimately unsuccessful negotiations over a stipulated protective order. Respondent counters that Petitioner should have immediately filed a motion with the Court for protection and then negotiated for a mutually agreeable order.

We see Respondent's suggested path as poor use of the Court's and of the parties' time. The policy of this Court is to encourage parties to resolve issues like protective orders between themselves whenever possible without motions. This saves taxpayer and government resources. We should not penalize a party for attempting to negotiate in good faith a stipulated protective order even though the effort was ultimately unsuccessful. We therefore do not view the award of attorney's fees as appropriate in this case.

R.R.K.

STATE OF MINNESOTA TAX COURT
TENTH JUDICIAL DISTRICT
COUNTY OF SHERBURNE REGULAR DIVISION

Menards, Inc.,

Petitioner,

vs.

County of Sherburne,

Respondent.

ORDER

File No. C2-98-460

Dated: August 20, 1998

This matter was heard by the Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, on August 11, 1998, at the Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota.

Edmund C. Meisinger, Attorney at Law, represented the Petitioner.

Kathleen A. Heaney, Assistant Sherburne County Attorney, appeared for the Respondent.

The Court, having heard and considered the arguments of counsel, and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. The Respondent's motion to compel discovery is denied.

2. The parties' motion for continuance is hereby granted and trial of this matter shall be rescheduled for December 2, 1998.

IT IS SO ORDERED.

BY THE COURT,

Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: August 20, 1998

MEMORANDUM

The central question in this matter is whether owner-occupied property which has no rental income falls within the data production requirements of Minn. Stat. § 278.05, subd. 6. We find that it does not.

Respondent filed a motion to compel discovery of sales and income information relating to the subject property. Respondent relied upon Minn. Stat. § 278.05, subd. 6 which states in part:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter.

Petitioner is a large merchandiser of home improvement goods sold at low profit margins. Its stores, including the subject property, are owner occupied and are free standing. It is not Petitioner's practice to rent its property to tenants. The subject property is new, having been completed shortly before the assessment date but not open for business until after the assessment date.

Petitioner admits that it did not provide income and expense data for the property to the assessor but claims that the property is not income producing within the meaning of Minn. Stat. § 278.05, subd. 6 and was not producing income on the assessment date.

Petitioner argues that Minn. Stat. § 278.05, subd. 6 applies only to "income producing" properties which are typically rental properties. The subject property, under this theory, is not "income producing" within the meaning of the statute because it is owner-occupied, freestanding and all revenue is generated by the sale of goods not through rental of the property. Petitioner also argues that since it was not yet open for business on the assessment date, no income was being produced so that even if the court were to find the property "income producing," it was not producing any income on the assessment date.

In Hubbard Milling Co. v. County of Blue Earth, File Nos. C4-93-641, C6-93-642 (Minn. Tax Ct. Feb. 1, 1994), we held that owner-occupied property used as a corporate headquarters was not income producing property. Respondent points to the holding in

T & L Investments to argue that only a corporate headquarters which was owner-occupied was found to be non-income producing. We disagree with that interpretation.

In T & L Investments v. County of Dakota, File No. C9-95-7347 (Minn. Tax Ct. Order dated Aug. 24, 1995) and Larson Leasing, Inc. v. County of Dakota, File No. C1-95-7231 (Minn. Tax Ct. Order dated Aug. 24, 1995), we held the property to be income producing because the owner and occupier were separate but related entities not because of the nature of the owner-occupant's use of the property, i.e., use as something other than a corporate headquarters. This court, in fact pointed to owner-occupancy as the controlling feature in T & L Investments and in Larson. "The present case involves property owned and occupied by separate, but related companies. It is not owner-occupied as in the case of the Hubbard Milling property." (emphasis added) T & L Investments, File No. C9-95-7337 (Minn. Tax Ct. Order dated Aug. 24, 1995) at slip op. 3-4.

In addition, based on the facts submitted to the court, the property was completed but not operational on the assessment date and therefore not producing income. Ryan v. County of Dakota, File No. C5-95-7426 (Minn. Tax Ct. Order dated Aug 24, 1995). The possibility that the property may have produced income at a later date does not change its status on the assessment date. Brookfield Trade Center, Inc. v. County of Ramsey, ___ N.W.2d ___ (Minn., filed Aug. 13, 1998) slip op. at 9; Stoltzman v. County of Ramsey, 312 Minn. 186, 190-93, 251 N.W.2d 130, 133-35; Martin County v. Drake, 40 Minn. 137, 138-39, 41 N.W. 942, 942 (1889).

We find that this property is not income producing within the meaning of Minn. Stat. § 278.05, subd. 6. Petitioner is therefore not subject to its disclosure requirements. Motion to compel discovery is denied.

The parties mutually agreed to a continuance of trial until December. Motion to continue is granted.

R.R.K.

STATE OF MINNESOTA — TAX COURT
FOURTH JUDICIAL DISTRICT
COUNTY OF HENNEPIN — REGULAR DIVISION

Minnesota Timberwolves, Limited Partnership,

Petitioner,

vs.

County of Hennepin,

Respondent.

ORDER DENYING MOTION TO COMPEL

File Nos. TC-26329
TC-26856

Dated: April 20, 1999

The Honorable Diane L. Kroupa, Chief Judge of the Minnesota Tax Court, heard Petitioner's Motion to Compel at the Hennepin County District Court facilities in the Minneapolis City Hall, in Minneapolis, Minnesota on March 31, 1999.

Thomas R. Muck, Attorney at Law, with the Fredrikson & Byron Law Firm represented Petitioner.

Robert T. Rudy, Senior Assistant Hennepin County Attorney, represented Respondent (the "County").

Charles B. Rogers, Attorney at Law, with the Briggs and Morgan Law Firm represented Ogden Entertainment, Inc. ("Ogden").

Larry F. Cooperman, Assistant City Attorney, represented the City of Minneapolis and the Minneapolis Community Development Agency ("MCDA").

The Court, having heard and considered the arguments of counsel, and upon all of the files, records and proceedings herein including Ogden's supplemental submission on April 12, 1999, the affidavit submitted by Petitioner's expert and Petitioner's supplemental submission dated April 16, 1999, now makes the following:

ORDER

1. We deny Petitioner's Motion to Compel Discovery.

2. Petitioner shall reimburse Ogden and MCDA reasonable expenses they each incurred to respond to the subpoena and to oppose this motion.

IT IS SO ORDERED.

BY THE COURT,

Diane L. Kroupa, Chief Judge
MINNESOTA TAX COURT

DATED: April 20, 1999

MEMORANDUM

The subject property is the Target Center in downtown Minneapolis. The Minneapolis Community Development Agency (MCDA) owns the subject. Ogden

Entertainment, Inc. ("Ogden") manages and operates the Target Center and other professional sports arenas across the country. Ogden pays MCDA, the owner, $1 per year to operate the Target Center.

The Target Center is home to the Timberwolves and is used for other professional and amateur sporting events, numerous national and local entertainment acts and conventions. The subject also includes a video production facility, a restaurant and a fitness club. For use of the Target Center, Petitioner has agreed to pay property taxes and Ogden has agreed to maintain the Target Center and make routine repairs and maintenance.

Petitioner contests the January 2, 1996 and 1997 value of the Target Center and seeks to discover from Ogden, a non-party witness, all of Ogden's financial records from 1992 to the present that Ogden asserts is highly confidential and proprietary ("Subpoenaed Information"). The Subpoenaed Information includes Ogden's revenues and expenses from concerts and concession sales at the Target Center.

Ogden argues that if we deem some or all of the Subpoenaed Information relevant, Ogden will produce the information as long as a protective order is in place. Ogden requests that the Subpoenaed Information receive the additional protection we have previously granted to a significantly similar and unique a property as the Target Center. Mall of America Co. v. County of Hennepin, File Nos. TC-16076, TC-16772, TC-18309, TC-21195 and TC-22440 (Minn. Tax Ct. Order dated Aug. 2, 1995) modifying Minn. Tax Ct. Order dated Mar. 20, 1995. The so-called "super-protection" Ogden requests includes restricting the Subpoenaed Information only to Petitioner, the County, their counsel and experts who will prepare an appraisal of the

Target Center and requiring, upon conclusion of the litigation, that the Subpoenaed Information be returned to Ogden, a non-party.

The City and MCDA join in Ogden's request since they have or are entitled to receive the Subpoenaed Information only because Ogden provides it to them.

The County has not subpoenaed the Information. The County wants the Subpoenaed Information ***only if*** it is provided to Petitioner. The County refutes that the Subpoenaed Information is needed to overcome a motion to dismiss attack under Minn. Stat. § 278.05, subd. 6 for failing to provide relevant income and expense data.

Discovery Motion Error! Bookmark not defined.

After extensive briefing by all involved counsel and receiving an affidavit from the outside appraisal expert retained by Petitioner and supplemental memoranda by Ogden's counsel and Petitioner's counsel, we deny Petitioner's Motion to Compel. We accept that we have considerable discretion in granting or denying discovery requests. Montgomery Ward & Co. v. County of Hennepin, 450 N.W.2d 299, 305 (Minn. 1990). We have been and continue to be willing to allow broad discovery in Tax Court matters if we are convinced that discovery will produce relevant information. Northwestern Nat'l Life Ins. Co. v. County of Hennepin, File No. TC-18797 (Minn. Tax Ct. Order dated July 21, 1994)(citing Minn. R. Civ. P. 26.02). Cf. Equitable Life Assurance Soc'y v. County of Hennepin, File Nos. TC-13351, TC-16286 and TC-18917 (Minn. Tax Ct. Order dated Dec. 9, 1994)(discovery motion denied requesting broad shopping mall information rather than information relevant to value the Southdale mall at issue).

Relevant information is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. At issue here is the value of the Target Center. Thus, the question becomes whether the Subpoenaed Information is relevant to the value of the Target Center.

We are not convinced that the Subpoenaed Information is relevant to the value of the Target Center. We are persuaded by arguments of Ogden's counsel that what someone pays to attend a rock concert is not relevant to what the Target Center is worth. We agree with Ogden that information relevant to determine the market value of the Target Center includes income derived from the property, not income businesses within that property derived.

It is undisputed that Ogden pays the Target Center's owner, MCDA, $1 per year to operate the Target Center. This is not the economic rent that may affect the value of the Target Center. The economics of financing, building and leasing the Target Center are complex. Considering the time it took to negotiate the transaction and given that counsel represented each entity, we are convinced that each party received what they bargained for in the transaction. While it is not yet clear how the negotiated economics will be used to value the Target Center, it is clear that what a business inside the Target Center makes is not relevant to the value of the Target Center.

We assume, based upon Ogden's representations, that Petitioner has actual and complete expense and income information relating to the Target Center for an appraiser to complete the income capitalization approach. For example, Petitioner has information on (i) the amount Ogden has spent

to maintain and repair the Target Center and (ii) income generated from leasing the Target Center including parking garage revenue.[1] We further assume Petitioner has accurate and complete information on costs and capital improvements made at the Target Center for an appraiser to complete the cost approach. If these assumptions are untrue, Ogden shall provide this information to Petitioner and the County by 4:30 p.m. on May 14, 1999.

Because we deny Petitioner's discovery motion for the Subpoenaed Information, we need not address Ogden's request for a protective order.

Award of Costs to Oppose Discovery Motion

Ogden also asks that Petitioner reimburse Ogden for its costs in responding to these discovery requests under Minn. R. Civ. P. 45.06 because Ogden is a non-party. MCDA joins in Ogden's request. They each request to be reimbursed reasonable fees (i) to review the documents requested in response to the subpoena for responsiveness and privilege, (ii) to prepare for and attend the motion to compel hearing and (iii) for copying and other related costs. They each also request reimbursement for employee and attorney time to prepare for deposition of certain employees.

Petitioner agrees that Ogden and MCDA are entitled to reasonable compensation for their time and trouble in connection with the subpoena.[2] Petitioner argues, however,

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[1] It is not clear if the parking revenue is derived from property subject to a petition.

[2] Minn. R. Civ. P. 45.06 provides that any subpoenaed parties are entitled to reimbursement for their time and

that they should not be reimbursed for opposing the Motion to Compel. Moreover, Petitioner argues that Ogden is an ex officio party to this property tax appeal because Ogden entered into an agreement with Petitioner that provides that Ogden shall join in any tax contest if requested by Petitioner. This agreement does not make Ogden a party to this litigation.

We reject Petitioner's argument that Ogden and MCDA are not entitled to reimbursement for costs incurred to oppose the Motion to Compel. We read Minn. R. Civ. P. 37.01(d)(2) together with Minn. R. Civ. P. 26.02 (c) as Ogden requests. Therefore, because we deny the Motion to Compel, we may require the moving party or the attorney filing the motion or both to pay to the person opposing the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees. We so order Petitioner to reimburse costs Ogden and MCDA incurred to oppose the Motion to Compel.

We lack any affidavits regarding the costs Ogden or MCDA incurred to oppose this Motion to Compel. We assume they are reasonable.[3] Petitioner shall reimburse Ogden and MCDA the reasonable costs they incurred to oppose the Motion to Compel and respond to the subpoena. No fees for depositions are allowed at this time because no depositions have occurred.

D.L.K.

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expense involved in preparing for and providing testimony or producing documents.

[3] Petitioner may request the Court to review the reasonableness of Ogden's and MCDA's costs.

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

31

No. 05-1655

IN THE

Supreme Court of the United States

KMART CORPORATION,

Petitioner,

v.

STEARNS COUNTY, MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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Attorneys for Respondent

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SECONDARY AUTHORITY

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I. SUMMARY

This case arises from the Minnesota Tax Court's routine application of a clear state statute, in a manner entirely consistent with existing Minnesota Supreme Court precedent. KMART's petition - seeking no more than a review of the Minnesota Supreme Court's interpretation of a state civil statute, and the Tax Court's application of that statute to particular facts - presents no substantial federal question. Minnesota affords taxpayers a plain and simple remedy to obtain a refund of any tax found to be excessive. Our state's tax court provides taxpayers a panoply of procedural safeguards and painstakingly seeks to apply its own precedent, subject to the overriding authority of the state Supreme Court. KMART's problem derives from its own failure to follow clear and simple statutory rules governing property tax proceedings.

Minnesota Statutes Section 278.05 subdivision 6(a) requires a property tax appellant to provide income and expense figures to the county assessor within 60 days after filing a petition for judicial review of a property tax assessment against income-producing property, but provides an exception for information that is unavailable to the taxpayer. The statute is commonly referred to in Minnesota property tax circles as the "60-day rule." Failure to provide available information results in dismissal of the petition, and that has resulted in several attempts by non-compliant taxpayers to narrow enforcement of the 60-day rule in some way. However, the Minnesota Supreme Court has repeatedly enforced this statute according to its terms. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997); Mendota Mall Associates v. County of Dakota, 578 N.W.2d 350

(Minn. 1998); KMART v. County of Becker, 639 N.W.2d 856 (Minn. 2002); KMART v. County of Douglas, 639 N.W.2d 863 (Minn. 2002).

In 2001, KMART concurrently filed 54 property tax petitions for commercial properties in counties throughout the State of Minnesota. One of these 54 petitions was filed to challenge Stearns County's assessment against KMART commercial property in Stearns County. Another of these 54 petitions was filed to challenge Anoka County's assessment against KMART commercial property in Anoka County.

Although the Stearns County KMART had considerable expense information in its possession, KMART elected to provide no expense information at all to the Stearns County Assessor. Stearns County moved for dismissal of the 2001 and later petitions pursuant to the 60-day rule. KMART then filed bankruptcy, and at KMART's request, the Tax Court stayed all proceedings until bankruptcy proceedings were complete. Once the stay was lifted, Stearns County renewed its motion to dismiss. In response, KMART admitted that the disclosure statute clearly required disclosure of any relevant information in its possession, but claimed that it was excused from supplying expense information because it had no relevant information available.

The Anoka County and Stearns County appeals moved through the Tax courts separately, before different judges, both delayed by the bankruptcy proceedings. In both cases, the County moved for dismissal based upon non-production of property-related information, but Stearns County submitted a significantly different factual record to the Tax Court than Anoka County did. In each case.

KMART opposed dismissal with a conclusory affidavit asserting that there was no relevant expense related information for the local commercial property. But Stearns County rebutted that affidavit by proving specifically that KMART did maintain extensive real estate related expense information. Also, Stearns County provided detailed unrebutted expert testimony showing that the withheld information was directly related to property valuation. Based on this record, the Tax Court agreed that Stearns County KMART withheld readily available relevant information and dismissed KMART's Stearns County petition.

Stripped to its essentials, KMART's contention here is that because the Tax Court judge hearing KMART's Anoka County tax petition found that the Anoka KMART lacked relevant property expense information for the Anoka facility, it followed as a matter of constitutional law that a different Tax Court judge adjudicating KMART's Stearns County petition was bound to determine that the Stearns County KMART had no relevant expense information for the Stearns County store either. But as the Tax Court found, the evidence in the two cases on unavailability was simply not the same. This case is not about stare decisis at all, it is about two judges weighing different evidence in different cases and making judgments appropriate to the evidence they heard in each case.

KMART's petition does not raise a substantial federal question. There is nothing shocking or unusual about the Minnesota Supreme Court's decision. The statute in question plainly requires disclosure of expense information. No decision of the Minnesota Supreme Court offered reason to KMART to withhold expense related information. KMART

was not surprised or ambushed: in fact, KMART itself acknowledged to the Tax Court that the statute clearly requires disclosure of relevant expense information, unless it is unavailable. KMART Opposition to Stearns County Motion to Dismiss, page 10.

KMART relies on a series of void-for-vagueness decisions in this court holding that criminal statutes--especially those implicating constitutionally protected conduct--must be sufficiently precise to place a citizen on notice of what conduct is prohibited. The Minnesota disclosure statute would pass muster under that standard, even if it were a penal statute.

KMART also relies upon a series of cases, such as McKesson and Reich v. Collins, each of which involved the obligation of states to provide their taxpayers with a meaningful procedure to obtain a refund of a state tax imposed in violation of the United States Constitution or federal privileges and immunities. This Court has held that a State Supreme Court cannot retroactively obliterate a time-honored state remedy in order to withdraw from the taxpayer the ability to collect a refund of a tax imposed in violation of the United States Constitution or other federally conferred rights. The Minnesota Supreme Court's decision does not offend that standard.

This Court's decision in Brinkerhoff-Faris Trust & Savings Co. v. Hill clearly explains that a taxpayer "assume[s] the risk that the ultimate interpretation by the highest court might differ from his own." That warning is singularly appropriate here, because by 2001, when KMART filed its Stearns County tax petition, the Minnesota Supreme

Court had already clearly held that the 60-day rule would be enforced according to its literal terms. The Minnesota Supreme Court's decision here is entirely consistent with its former precedent and simply enforces the plain language of the applicable statute.

This Court has never suggested that an inferior court's decision has stare decisis effect in a state supreme court nor has it suggested that the United States Supreme Court supervises state supreme courts in deciding what weight to afford to the decisions of inferior state courts. KMART is attempting to use the United States Constitution to foist upon the Minnesota Supreme Court and legislature a patently absurd construction of the Minnesota statute in question.

II. STATEMENT OF THE CASE

Petitioner KMART rents a build-to-suit commercial center in Waite Park Minnesota from Continental Properties under a net lease which shifts virtually all facility expenses to tenant KMART. KMART directly pays common area costs, building casualty and liability insurance, routine maintenance costs, parking lot maintenance and utilities under its lease obligation[1]. KMART maintained facility-

[1] The KMART-Continental Properties Lease authorizes KMART to file a tax-court petition and requires Continental Properties to provide KMART with any information it needs to perfect its appeal. KMART made no effort to ask Continental Properties to assist by providing the information that Continental Properties possessed.

specific monthly and annual financial statements which identify these real estate related expenses for the Waite Park property as part of its regularly kept business records.

Under Minnesota Law, a property taxpayer must supply facility operating expense information to the County assessor within 60 days of perfecting a tax appeal on leasehold property. Failure to do so results in dismissal of the appeal. KMART filed a petition challenging its property tax, but failed to supply any of the facility operating expense information maintained by KMART within 60 days as required by the statute. Accordingly, Stearns County moved to dismiss the petition.

In response to the motion to dismiss, KMART admitted that KMART knew that it was required to supply expense-related information. In fact, KMART specifically acknowledged that the 60-day rule "clearly require[s] the petitioner to provide *any* of the required information *within its possession on the date of the deadline.*" KMART Opposition to Motion page 4 (emphasis in original).[2] KMART defended the motion to dismiss not on vagueness grounds, but upon the grounds that the relevant information was not available.

In support of its unavailability defense, KMART

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[2] Indeed, KMART's current attorney himself testified to the legislature that while unsophisticated small taxpayers might be unaware of the requirement at all, that those taxpayers familiar with tax law, a category into which KMART clearly falls, would have no trouble complying. MN House Tax Committee Hearing: 3/25/94 PM, R. App. 4.

provided a cursory conclusory affidavit asserting that KMART had no information on facility operating expenses in its possession. KMART captioned its written argument to the Tax Court: "The 60-day Rule Does Not Require Kmart to Produce Unavailable Information." KMART told the Tax Court that in order to obtain dismissal, "Stearns County would have to disprove KMART's showing that records of the real estate operation were unavailable to it." Id., page 10. In its dismissal decision, the Tax Court applied the law exactly as articulated by KMART in its opposition to the motion and found that Stearns County had disproved "that records of the real estate operation were unavailable to it." The Court found that KMART's conclusory affidavit was demonstrably false and that KMART clearly had this information in its possession.

KMART then moved the Tax Court to reconsider its decision. KMART argued that other Tax Court judges had found affidavits similar to that filed by KMART to be persuasive evidence on the unavailability issue. KMART argued that the doctrine of stare decisis should lead the Tax Court to accept its conclusory affidavit as factually correct just like other judges had done in previous cases. KMART also argued that prior Tax Court decisions should be read to hold that real estate expenses need never be produced, because they were not relevant to the appraisal of real estate. The key decision upon which KMART relied dealt with an Anoka County KMART rendered in 2004, nearly three years after Stearns County first moved to dismiss KMART's petition.

In a careful opinion, the Tax Court rejected KMART's arguments. Petitioner's App. 54. The fact that

some other tenant proved that expense information was not available in its case did not govern the factual dispute over unavailability in this case. Here, Stearns County had provided overwhelming proof that the expense information was actually in KMART's possession. Real estate related expenses were reported in KMART's financial statements for the Stearns County facility, and Stearns County had provided unrebutted evidence that these expenses were plainly related to the appraisal process.

The Tax Court carefully dissected prior precedent and rejected KMART's contention that previous decisions had held that expense related information did not need to be provided. The plain language of the Statute required production of both income and expense information. The controlling decisions by the Minnesota Supreme Court had specifically ruled that this statute plainly requires the taxpayer to supply the county assessor all income **and expense** figures to which the tax petitioner has access. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). Cf Mendota Mall Associates v. County of Dakota, 578 N.W.2d 350 (Minn. 1998); KMART v. County of Becker, 639 N.W.2d 856 (Minn. 2002); KMART v. County of Douglas, 639 N.W.2d 863 (Minn. 2002). There was no hint in Supreme Court precedent that taxpayers could ignore the expense production requirement with impunity. Prior Tax Court cases merely held that taxpayers need not produce business operating expenses, such as personnel costs, because these expense have no bearing on property evaluation. The expenses involved here were directly related to the real estate: adoption of KMART's interpretation of the statute would eviscerate the plain meaning of the statute.

In its appeal to the Minnesota Supreme Court[3], KMART argued that the Tax Court's factual finding that KMART's data was available represented groundbreaking legal precedent and that the factual finding should be applied only prospectively under Chevron Oil Company v. Huson, 404 U.S. 97 (1971).[4] KMART also relied upon dicta in the 2004 Anoka County Tax Court decision (App. 8) and argued that these decisions should somehow trump the Supreme Court's own precedent and the Tax Court's decision in KMART v. Stearns County. The Minnesota Supreme Court rejected KMART's appeal and held that is decisions "uniformly support a broad reading of the [disclosure] rule." The Court continued: "Consistent with our past decisions, we interpret the 60-day rule to require production of expense information that is useful and relevant to the appraisal process."

The Minnesota Supreme Court also rejected KMART's argument that the Supreme Court must follow erroneous inferior decisions of the Tax Court:

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[3] The Minnesota Supreme Court reviews Tax Court decisions by direct writ of certiorari, bypassing the Minnesota Court of Appeals. Unlike other civil cases, Tax Court decisions are reviewed as of right.

[4] KMART does not site Chevron in its petition here, because Chevron simply does not involve a case where this Court failed to apply the benefit of its decision to the prevailing party. Chevron actually made the decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) prospective as other parties who had not participated in this Court's Rodrigue decision.

> where the tax court incorrectly interprets a statute in one case, that interpretation does not override the statute in future cases. And, of course, decisions of the tax court have no binding effect on this court when we are ultimately called on to interpret a statute. Petitioner's App. 17 (citation omitted). 710 N.W.2d 761, 770.

The Supreme Court's decision then explained why the Tax Court decisions relied upon by KMART did not require prospective application. First, the Court found, these decisions simply did not stand for the proposition argued by KMART. No Tax Court decision had squarely held that relevant expense information need not be produced. Second, if the Tax Court had held that expense information need never be produced, that would constitute a plainly erroneous interpretation of clear statutory authority. Third, the Tax Court is an inferior tribunal; its decisions simply do not bind the Minnesota Supreme Court.

III. REASONS FOR DENYING THE PETITION

A. The Minnesota Tax Court's Decision Turned on a Factual Dispute.

In later sections we deal with KMART's claims that Minnesota's civil tax statute is subject to a void for vagueness challenge in this Court as well as KMART's claim that the Minnesota Supreme Court violated due process by failing to follow a legal interpretation rendered by an inferior tax court.

Each of those claims wrongly assumes that the Tax Court's decision in the Stearns County KMART rests entirely upon a reversal of lower-court legal precedent. On the contrary, the primary issue presented to the Tax Court by Stearns County's motion to dismiss was factual: should KMART be excused because relevant expense information was unavailable to KMART? This devolved into the factual question whether the Tax Court should believe KMART's employee's faulty generic affidavit in the face of overwhelming evidence to the contrary.

While KMART styles this as a legal dispute now, in the Tax Court this was submitted as a simple factual dispute. KMART there specifically told the Tax Court that the statutory requirement was not vague at all. It argued instead:

> The Minnesota Supreme Court has provided a common sense definition of the statutory term "unavailability" by paraphrasing the requirements of that Statute as "clearly requiring the petitioner to provide *any* of the required information *within its possession on the date of the deadline.*" A taxpayer cannot, however, be required to produce information not within its possession. The undisputed evidence demonstrates that KMART timely produced all income and expense figures in its possession, historic and actual, for the real property. (Emphasis in original).

While KMART here contends that the tax court's Anoka County decision turned on legal interpretation of the statutory language, when this case was argued in the Tax

Court, KMART admitted that Anoka County had been decided in KMART's favor: "[B]ecause Anoka County failed to rebut KMART's affidavits showing that it had no real estate operating expense or income information beyond what was produced...." As the Tax Court found, in the instant case, Stearns County had made a compelling factual record that the expenses sought here were (a) clearly available to the taxpayer and (b) plainly the kind of property related expense information customarily relied upon in the appraisal process. The judge presiding over the Anoka County case was persuaded by evidence presented in that case to make an unavailability finding while the judge presiding over the Stearns County case was persuaded not to make the unavailability finding.

B. Minnesota's 60-day Rule Does Not Violate Constitutional Void-for-Vagueness Principles as Written or as Applied.

KMART here relies upon three criminal cases in support of its contention that Minnesota's tax collection statute is facially void for vagueness. Connally v. General Construction Co, 269 U.S. 385 (1926) holds that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Connally involved the attempt to prosecute a contractor for a criminal violation of an Oklahoma prevailing-wage statute although the contractor could not determine the prevailing wage.

Grayned v. City of Rockford, also relied upon by KMART, involved the conviction of a demonstrator for "willfully making a noise or diversion that disturbs or tends to

disturb the peace." In holding that the statute was not unconstitutionally vague, the Court held that statutes imposing criminal penalties for exercising First Amendment Freedoms must not inhibit the exercise of those freedoms. 408 U.S. 104, 108-109 (1972).

Petitioner also cites Kolender v. Lawson, 461 U.S. 352 (1983) which struck down a California statute allowing the arrest and conviction of any person who loiters or wanders on the streets but cannot provide a "credible and reliable" identification and who could not account for their presence when requested by a police officer. The statute had both First Amendment and Fourth Amendment implications for this Court.

KMART supplies no case which suggests that the process of judicial interpretation of tax collection statutes is subject to the Constitutional void-for-vagueness doctrine. But there is no occasion here to consider whether a civil statute could ever be found void for vagueness, for the statute in question is so crystal clear. The statute plainly requires production of property related expenses. KMART plainly had property related expenses in its possession. KMART conceded in the Tax Court that the statute clearly applied, provided only that the County proved that relevant expenses not produced were actually in KMART's possession, and the Tax Court so found.

C. Kmart Wrongly Relies upon the McKesson and Reich Line of Decisions.

In a series of decisions, this Court has held that a state taxpayer is entitled to utilize traditional state court remedies to

collect a refund of a tax which violates the United States Constitution or other federally protected right. McKesson Corp v. Division of Alcoholic Beverage and Tobacco, 496 U.S. 18 (1990); Reich v. Collins, 513 U.S. 106 (1994); Newsweek, Inc. v. Florida Dept of Revenue, 522 U.S. 442 (1998); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). A state court may not frustrate a state taxpayer's right to relief from an unconstitutional taxation statute by eviscerating the state's procedural remedies in a way which has been designed to eliminate the right to refund.

In McKesson, wholesale liquor distributors filed suit, challenging a Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida-grown citrus crops and then bottled in Florida. After the tax was found to violate the Commerce Clause, the Florida Supreme Court refused to provide a refund or any other form of post-payment relief. This Court held that the Due Process Clause requires a state to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

Reich v. Collins, supra, dealt with an attempt by Georgia to avoid paying refunds to federal employees after this Court had previously ruled that a state could not exempt state retirement benefits from taxation if the state imposes an income tax upon federal retirement benefits. In Reich v. Collins, this Court held that Georgia could not frustrate attempts to recover the unconstitutionally collected tax by retracting what plainly appeared to be the only clear and certain post-deprivation remedy. The decision in Reich prevents state tax collectors from jiggering state procedures to

deprive a taxpayer of a remedy to enforce his federally protected rights.

In Newsweek, Inc. v. Florida Dept of Revenue, supra, Newsweek sought a refund of sales taxes following a determination that the exemption available for newspapers, but not magazines, was unconstitutional under the First Amendment. Following the determination, the Florida Supreme Court retroactively reversed its own longstanding precedent on how a taxpayer could obtain a refund effectively depriving Newsweek of any method to obtain a refund. Again, this Court acted to protect a taxpayer's right to obtain effective relief following a judgment vindicating a federally protected right.

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 281 U.S. 673 (1930), also cited by KMART, Savings Company invoked federal constitutional protection with a contention that a township assessor had intentionally and systematically discriminated against Savings Company's shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent, or less, of their value.[5]

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[5] In some sense, every tax assessment could be framed as raising constitutional issues on the theory that taxpayers are entitled to equal treatment. But if a state provides a remedy to challenge unequal assessment, the allegation of unequal assessment alone does not raise a federal question. Cf. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

The Missouri Supreme Court dismissed Savings Company's challenge by inexplicably reversing its own long-standing authoritative holding in the LaClede case on how a taxpayer perfects a tax appeal. As this Court wrote:

> Under the settled law of the state, that [LaClede] remedy was the only one available. .....after the decision in the LaClede case, it would have been entirely futile for the plaintiff to apply to the commission. That body had persistently refused to entertain such applications; and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the LaClede case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent.

The Brinkerhoff Court was very careful to recognize that State Courts are free to change their interpretation of law or procedure without constitutional consequence. The Missouri

Supreme Court decision represented a perfect-storm of constitutional invasions:

> ....the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; ... this court's power to review decisions of state courts is limited to their decisions on federal questions, and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.

The Brinkerhoff decision thus plainly and directly rejects KMART's contention here. Constitutional considerations are raised under the Brinkerhoff decision only if the highest court of the State has previously ruled authoritatively on the proper method to seek review, and then seeks retroactively to change that decision in a way that denies the taxpayer any remedy:

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.

Case-by-case interpretation of the law is inherent in our common law system of jurisprudence. One central feature of the common-law system is that the prevailing party is afforded the fruits of the favorable decision of the court. If the

prevailing party merely established rules of precedent applicable to future litigants, our common law system would be reduced to litigation by advisory opinion in which litigants had no concrete stake in the outcome, and in which no party would have standing to advocate its views on interpretation of the law. Affording the fruits of victory to the prevailing party is a fundamental tenant of our judicial system.

IV. CONCLUSION

KMART has not raised a substantial federal question. At the time it failed to file property related expense information, both statute and Supreme Court precedent plainly stated that expense information must be filed. KMART chose to withhold that information and dismissal resulted from routine application of a clearly written statute.

July 14, 2006

Respectfully Submitted,

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FILED
JUL 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1655

IN THE

Supreme Court of the United States

KMART CORPORATION,

Petitioner,

v.

COUNTY OF STEARNS,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Minnesota Supreme Court and Tax Court Decisions Did Not Rest Upon the Resolution of a Factual Dispute; They Reinterpreted a Statute and Rendered It Unconstitutionally Vague.

The opposition brief incorrectly asserts that the primary issue in this case was a factual dispute about whether certain information was actually available to Kmart within the 60-day period. (Opp. Brf. 11.) This contention misstates the record. Nowhere in the Minnesota Supreme Court's decision is there any discussion of an alleged dispute about the availability of certain information.

In fact, it is undisputed that Kmart timely provided information to the County for its petition years at issue,[1] including information about its lease of the subject property and operating revenue information about the store it operates as a tenant of the subject property. Kmart was not able to provide the expense information held to be relevant to valuation of the real estate under well-established Minnesota Tax Court precedent-- vacancy rates, management fees and replacement reserves -- because that information was in the possession of a third party landlord, not Kmart, and therefore was "unavailable" to Kmart within the meaning of the 60-Day Rule. *See Kmart Corp v. County of Otter Tail,* 2000 WL 1719925 (Minn. Tax Ct. 2000) (holding that the "expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves," all of

[1] Kmart filed petitions in 2000, 2001 and 2002 to challenge, respectively, the County's valuations of its property in 1999, 2000 and 2001.

which "are available to the Landlord, not the tenant"). App. at 135. Kmart also did not provide information about the expenses of operating its retail store at the subject property, including insurance, utilities and repair and maintenance expenses. Kmart did not produce this tenant-paid expense information because such information was not relevant to the valuation of the real estate, as determined by many prior Tax Court decisions. *See* pp. 7-8 of Kmart's Petition.

Stearns County thereafter moved to dismiss Kmart's action based on Kmart's alleged failure to produce information about the "expenses" for the subject property. Two categories of information were at issue: (1) information about "vacancy loss, management fees and replacement reserves," which the Tax Court had previously held *is* relevant and, if available, must be provided under the 60-Day Rule, but it is usually available only to the landlord, not a tenant; and (2) information about tenant-paid expenses including insurance, utilities, and repair and maintenance expenses, which the Tax Court previously held *are not* relevant to the valuation of the real property and which *do not* need to be provided under the 60-Day Rule.[2] As to the first category, Kmart argued in response to the County's motion to dismiss that the information was not available to Kmart because it

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[2] *See, Kmart Corp. v. County of St. Louis*, 2001 WL 40370 (Minn. Tax Ct. 2001) ("Since other operating expenses *including insurance, utilities and common area maintenance and repair expenses that are paid by the tenant* do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. . . . Therefore, these other operating expenses do not need to be provided" under the 60-Day Rule.) Petitioner's App. at 142-43 (emphasis added).

was information that the landlord, not Kmart possessed, and therefore was unavailable for Kmart to provide under the 60-Day Rule. As to the second category, contrary to statements made in the opposition brief, Kmart did not argue that its information about the expenses of operating its store at the subject property, including insurance, maintenance and repair expenses, was unavailable. Instead, Kmart argued that such tenant-paid expense information was not relevant and had never been required to be produced under the 60-Day Rule, as evidenced by a lengthy and consistent series of Tax Court decisions.

Thus, the issue in the Minnesota Supreme Court, and in the Tax Court, was *not* whether information about "expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant" was available to Kmart; the issue was whether such tenant-paid expense information fell within the scope of the 60-Day Rule's undefined "income and expense" language, despite prior holdings from the Tax Court that it did not. Accordingly, the primary issue in this case did not turn on a factual dispute, but rather on a legal issue as to the meaning of undefined statutory terminology.[3]

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[3] The opposition brief's reference at n.2 to legislative testimony given by Mr. Wilhelmy in opposition to the 60-Day Rule before enactment is not in the record before this Court, is incorrectly cited, and bears no relationship to the issues on appeal.

II. The Opposition Brief Fails to Address the Inherent Vagueness of the 60-Day Rule.

The opposition brief first erroneously argues that the vagueness doctrine is limited to criminal statutes. However, the Due Process Clause applies to civil litigants as well as criminal defendants. This Court long ago rejected the notion that the vagueness doctrine applies only in the criminal context, saying "It [is] not the criminal penalty that [is] held invalid, but the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925).

The void for vagueness doctrine has been invoked in many non-criminal matters. In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966), for example, a statute permitted a jury to impose a civil penalty in the form of court costs on the prevailing party in litigation, but failed to outline any criteria to be used by the jury in reaching its decision. The state appellate courts determined that the statute was not void for vagueness because "The Act 'is not a penal statute' but simply provides machinery for the collection of costs of a 'civil character' analogous to imposing costs in civil cases 'not as a penalty but rather as compensation to a litigant for expenses.'" *Id.* This Court rejected a purported distinction between civil and criminal matters, explaining "one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.* at 403. The void for vagueness doctrine requires greater scrutiny in criminal statutes and statutes

which infringe upon constitutional rights, such as the right to petition the government for redress. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *cf Barenblatt v. U.S.*, 360 U.S. 109, 137 (1959) ("the 'vice of vagueness' is especially pernicious where legislative power over an area including speech, press, petition and assembly is involved"). (Black, J. dissenting, joined by Warren, C.J. and Douglas, J.)

The opposition brief next argues that the 60-Day Rule is not vague because it simply requires production of "relevant" evidence. However, the problem is that the decision below permits a county and its litigation experts to make their own subjective (and unpredictable) relevance determinations years *after* the expiration of the 60-Day Rule. The opposition brief never addresses the fatal flaw of the statute: the fact that the determination of what information is "relevant" and must be provided within 60 days is ultimately made by the county, which is an adverse party to the litigation, and its litigation expert witnesses, well *after* the 60-day period has expired.

The language in the decision of the Minnesota Supreme Court highlights the lack of objective criteria for the scope of the information that must be produced. In its syllabus, the court states that a taxpayer has to produce "sufficient information" about expenses paid by the taxpayer as a tenant. App. 3. In its central holding, the court goes on to state:

> We interpret the 60-day rule to require production of expense information that is *useful and relevant* to the appraisal process.

App. 11 (emphasis added). The inherent vagueness of the statute results from the fact that no objective criteria exist to determine what information is "sufficient," or what

information a county or its litigation expert will opine, after the fact, is "useful and relevant" to the appraisal process.

In this case, for example, a number of previous Tax Court rulings held that tenant-paid expenses, and in particular, utilities, insurance and maintenance and repair expenses, are *not* relevant to the valuation of the property. *See Kmart Corp. v. County of St. Louis*, 2001 WL 40370 (Minn. Tax. Ct. 2001) ("operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant . . . are not relevant [and] do not need to be produced under the 60-day Rule"); *see also* cases cited on pp. 7-8 of the Petition.

Despite the holdings of those cases, Stearns County hired an expert witness for the present litigation, Dwight Dahlen, to opine that information about tenant-paid expenses -- in particular, utilities, insurance and maintenance and repair expenses -- *would be* useful and relevant to the appraisal of the landlord's real estate. However, that same expert previously testified as an expert on behalf of counties in many other property tax valuation disputes involving the same type of build-to-suit properties for Kmart, and Mr. Dahlen *never* used these types of tenant-paid expenses to determine property values in any of those prior cases, despite his affidavit in the present case that such information is relevant and necessary.[4] Instead, in each case involving the

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[4] In *Kmart Corp. v. County of Martin*, 2006 WL 771935 (Minn. Tax Ct. 2006) the data relied on by Mr. Dahlen to determine the value of the real estate in which Kmart leased space included vacancy and credit rates, the management fees paid, and reserves. In *Kmart Corp. v. Becker County*, No. CX-02-410 (Minn. Tax Ct. 2004) he valued the property *[footnote continued on following page]*

valuation of property under leases in which Mr. Dahlen has testified as an expert, he has analyzed only information about vacancy rates, credit losses, management fees and reserves in order to make valuation adjustments -- the very items that the Tax Court previously held are relevant and necessary to provide under the 60-Day Rule, but are in the possession of the landlord, and not of a tenant such as Kmart. *Kmart Corp v. County of Otter Tail,* 2000 WL 1719925 (Minn. Tax Ct. 2000) (holding that the "expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves").

It is this kind of subjective relevance determination, made by hired litigation experts after the fact, that renders the statute unreasonably vague. What information is "sufficient" and what information would be "useful and relevant" to the appraisal process is limited only by the imagination of a county's litigation expert.

Before taking away a party's valuable rights, such as the right to petition the government for redress from unfair and unequal taxation, a statute must define, in objective terms, what the party must do to preserve its rights. Just as a statute

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again by considering "vacancy and credit loss" rates, "management fees" and "reserves." In *Kmart Corp. v. County of Crow Wing*, 2001 WL 826120 (Minn. Tax. Ct. 2001) he again relied on vacancy and credit loss rates. This is the landlord's information, not the tenant's. In ***none*** of the cases in which Mr. Dahlen has valued leased real property has he analyzed and adjusted for tenant-paid expenses such as insurance, utilities, repair and maintenance expense in order to determine the value of the real estate.

of limitations would be unreasonably vague if it permitted actions to be dismissed if filed untimely, but failed to identify any objective time limits for filing actions, so too the statutory 60-Day Rule, as reinterpreted by the Tax Court and Minnesota Supreme Court in this case, is unreasonably vague because it fails to provide objective criteria for what "expense" information a taxpayer must provide within 60 days to avoid dismissal.

III. The Opposition Brief Misstates Kmart's Arguments Concerning the Due Process Violation of Doing Away With the Doctrine of Precedent.

The opposition brief also misstates Kmart's arguments about the Minnesota Supreme Court's ruling that decisions of the Minnesota Tax Court have no precedential value. The opposition brief mischaracterizes Kmart's position as arguing that "an inferior court's decision has *stare decisis* effect in a state supreme court . . . ." (Opp. Brf. at 5.) However, Kmart has never argued that the Minnesota Supreme Court, or any other appellate court, is bound under the doctrine of precedent or *stare decisis* to follow decisions of inferior courts. Instead, the issue is whether it is a due process violation to declare that decisions of a court -- particularly a court like the Minnesota Tax Court, which is a "court of record" having "statewide jurisdiction," established by the Minnesota Legislature as the "sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state" (Minn. Stat. § 271.01, subd. 5) -- have no precedential effect.

The issue of the precedential effect of tax court decisions arose in the context of Kmart's claim that the decision of the Minnesota Tax Court in this case, as affirmed by the decision of the Minnesota Supreme Court, should be given prospective

application only because it established a different rule of law than previously has been consistently followed in the Tax Court. Minnesota has adopted the prospective ruling doctrine that this Court recognized in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). *See Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982). The Minnesota Supreme Court acknowledged that its decision, and the decision of the Tax Court in this case, departed from prior Tax Court decisions, App. 9, but concluded that the *Chevron* prospective ruling doctrine should not be applied to limit the application of the new rule to the existing case because "the decisions of the tax court do not qualify as precedent for purposes of retroactivity analysis." App. 17.

The Minnesota Supreme Court's declaration that the decisions of the Minnesota Tax Court have no precedential effect is a violation of due process because it strips away from litigants important procedural safeguards that are deeply rooted in the common law. The doctrine of precedent or *stare decisis* does not require one court rigidly to adhere to prior decisions of another court. It does protect a litigant's right to due process by at least forcing a court that departs from precedent to analyze and address contrary precedent. *Stare decisis* requires a court to explain the reason for its departure from precedent -- such as that the case involves distinguishing facts or that the rule announced in the prior decision is incorrect or should be changed. The doctrine of precedent or *stare decisis* permits the law to develop in an orderly and logical fashion, and provides a degree of certainty in the rule of law that people can rely upon as they plan their affairs.

Abolishing the doctrine of precedent within any court system -- particularly within a court system such as the Minnesota Tax Court which was established to have "statewide

jurisdiction" and the "sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising out of the tax laws of the state" -- is a grave violation of due process. It fosters ad hoc and arbitrary decisions and contradictory rules of law. Statutes and rules would not have any understood meaning if different courts could adopt whatever interpretation they chose, without consideration of interpretations given in prior court decisions. Litigants would have no ability to determine their course of action in reliance upon any particular rule of law. No issue would ever be settled. Litigants could re-litigate any issue, despite the fact that prior decisions had resolved the issue the other way. It is because of these types of concerns that the doctrine of precedent has been entrenched in our nation's common law throughout its history. Abolishing the doctrine of precedent within the Minnesota Tax Court, and refusing to apply the *Chevron* purely prospective ruling doctrine to the recent change in statutory interpretation because Tax Court decisions have no precedential effect, as the Minnesota Supreme Court has ruled here, violated Kmart's due process rights.

July 24, 2006

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